V MEDICAL SERVICES M SDN BHD
v. SWISSRAY ASIA HEALTHCARE CO LTD

FEDERAL COURT, PUTRAJAYA
ABANG ISKANDAR PCA
NALLINI PATHMANATHAN FCJ
ZABARIAH MOHD YUSOF FCJ
[CIVIL APPEAL NO: 02(f)-1-02-2024(W)
3 MARCH 2025

Abstract – *(i) Where a party to an arbitration agreement issues a notice under s. 466(1)(a) of the Companies Act 2016 against the other party in respect of a debt that is disputed, such dispute falling within the ambit of the said arbitration agreement, in seeking to restrain the filing or continuing of winding-up proceedings grounded on such notice, the other party is required to show the debt is bona fide disputed on substantial grounds; (ii) Where two Acts are composite and distinct, they ought to be construed and applied within their respective contexts. The importation of statutory provisions from one statute unrelated to, or distinct from another, is not tenable. Save for specific situations, an Act is meant to be construed in light of its own terms and not by the terms of another statute. Where statutory provisions are not to be applied interchangeably in separate and distinct statutes, then legislative intent too cannot be incorporated from one statute to another. A balance ought to be achieved in each case, by allowing the prevailing laws to apply respectively.*

COMPANY LAW: *Winding-up – Petition – Debt due and owing – Issuance of statutory notice for payment – Failure to pay sum required meant winding-up petition would be filed against company – Company applied for Fortuna injunction to initiate winding-up proceedings – Applicable threshold standard – Whether higher or lower threshold – Whether 'genuine or bona fide dispute' proper test to follow in deciding whether to allow, stay or dismiss winding-up petition – Applicable test when petition disputes existence of debt which comprises basis for winding-up petition but dispute relating to such debt falls within scope of arbitration agreement – Whether justifiable to import statutory provisions or legislative intent of Arbitration Act 2005 into statutory provisions regulating winding-up petitions under Companies Act 2016 – Whether prevailing laws ought to apply respectively to achieve balance*

ARBITRATION: *Reference of dispute – Winding-up petition – Issuance of statutory notice for payment – Failure to pay sum required in statutory notice meant winding-up petition would be filed against company – Company applied for Fortuna injunction to initiating winding-up proceedings – Applicable threshold*

standard – Whether higher or lower threshold – Whether 'genuine or bona fide dispute' proper test to follow in deciding whether to allow, stay or dismiss winding-up petition – Applicable test when petition disputes existence of debt which comprises basis for winding-up petition but dispute relating to such debt falls within scope of arbitration agreement – Whether dispute subject to arbitration agreement – Whether liability for debt to be determined by way of arbitration – Whether justifiable to import statutory provisions or legislative intent of Arbitration Act 2005 into statutory provisions regulating winding-up petitions under Companies Act 2016 – Whether prevailing laws ought to apply respectively to achieve balance

The appellant, V Medical Services Sdn Bhd ('company'), a company incorporated in Malaysia, was in the business of, *inter alia*, importing, exporting, trading, buying, selling, supplying, and acted as agents and sub-agents for medical equipment. The respondent, Swissray Asia Healthcare Co Ltd ('Swissray'), a foreign company incorporated in Taiwan, was involved in the research and development, manufacture, sales and service of Medical Imaging. The company and Swissray had signed a distribution agreement. Swissray then identified a potential customer and end-user, University of Malaya Medical Centre ('UMMC'). Swissray stated that there was an understanding between the parties both pre and post the signing of the distribution agreement, that a purchase of the two medical devices by the company was conditional upon UMMC becoming the end-user or purchaser of the devices. The company issued a purchase order for the machines in question, in the order value which amounted to USD213,500. Swissray reiterated that the two machines were for demonstration and the correspondence indicated that the company was not the end-user or purchaser. The company received the two medical devices and delivered the same to UMMC. Swissray then issued a proforma invoice in the sum of USD200,000. The company made a payment of USD20,000. The company alleged that Swissray verbally advised them that it was terminating the distributor agreement. In anticipation of the same, the company issued a letter acknowledging the termination and asked for a refund of the USD20,000 paid. At this time, there were discussions about an intended acquisition of Novadaq by Stryker Corporation ('Stryker'). The company only discovered the fact of the acquisition when it approached Stryker regarding the two medical devices. Stryker responded by questioning the rights of dealing with the two medical devices. Swissray offered the company three options – the first being an outright purchase by the company, which would require the payment of the full purchase price while the other two options were the surrender of ownership of the two medical devices on different dates. It was apparent from the above events that there was no concluded termination, no exact sum determined to be in issue and that parties were still negotiating. It was in reliance on the discussion with Swissray, as well as the hopes of a prospective sale with UMMC, that the

company made two further payments of USD20,000 each. Stryker, however, confirmed with the company that Swissray was not an authorised distributor of the Novadaq products in any country. The company then stopped further payments and maintained that it would not pay anything to Swissray in light of the termination of Swissray as Novadaq's distributor. The company sought a letter certifying that Swissray was the correct party to deal with in respect of the purchase of the two medical devices. Swissray later advised that it could not furnish the requested letter but that it was in the midst of handing over a letter to Stryker to receive some compensation. It suggested that the company maintain its relationship with Stryker. The company then sought assistance from Stryker to complete the sale with UMMC and sought to resolve the entire matter. This attempt did not succeed. Swissray demanded payment for the total purchase price of the two demonstration units of medical devices. Swissray maintained that the total purchase price constituted a debt due and owing to them and proceeded to serve a notice of demand on the company. The effect of the notice was that if the company failed to pay the sum required in the statutory notice, a winding-up petition would be filed. The company filed an application to the High Court for a *Fortuna* injunction against Swissray to preclude them from initiating winding-up proceedings against the company. The High Court granted the *Fortuna* injunction sought, applying the lower threshold standard pronounced in *Salford Estates (No. 2) Ltd v. Altomart Ltd (No. 2)* ('*Salford*'). Swissray appealed to the Court of Appeal against the grant of the *Fortuna* injunction. The Court of Appeal chose not to follow the 'lower threshold' test pronounced in *Salford*, maintaining that the higher threshold applied in winding-up proceedings, namely that the existence of a 'genuine or *bona fide* dispute' was the proper test to follow in deciding whether to allow, stay or dismiss a winding-up petition. The *Fortuna* injunction granted was set aside. Hence, the present appeal. The issue that arose was what was the test to be adopted when a defendant in a winding-up petition, disputed the existence of the debt which comprised the basis for the winding-up petition, but the dispute relating to such debt fell within the scope of an arbitration agreement.

Held (allowing appeal; reinstating *Fortuna* injunction ordered by High Court)

Per Nallini Pathmanathan FCJ delivering the judgment of the court:

(1) The companies court was determining whether or not the debtor was insolvent so as to put into effect the collective and co-operative system pursuant to which there could be an orderly distribution of the assets to the creditors according to their entitlement on a *pari passu* basis. The companies court was not adjudicating on the dispute that comprised the subject matter of the arbitration agreement but was examining and determining a different issue, namely whether the defendant company was insolvent or not. It was not justifiable to import either the statutory

provisions or the legislative intent of the Arbitration Act 2005 ('AA') into the statutory provisions regulating winding-up petitions under the Companies Act 2016 ('CA'). Where the two Acts are composite and distinct, they ought to be construed and applied within their respective contexts. The importation of statutory provisions from one statute unrelated to, or distinct from another, is not tenable. Save for specific situations, an Act is meant to be construed in light of its own terms and not by the terms of another statute. It followed therefore that where statutory provisions are not to be applied interchangeably in separate and distinct statutes, then legislative intent too cannot be incorporated from one statute to another. (paras 146-150)

(2) This court followed the decision in *Sian Participation Corp (In Liquidation v. Halimeda International Ltd* ('*Sian*') as its approach appeared to clarify the law while giving independent consideration to both arbitration and insolvency. Significantly, the adoption of the conventionally utilised test in insolvency proceedings, namely that it was only upon establishing that a debt was genuinely disputed on substantial grounds that a winding-up petition would be stayed, even where there was an arbitration agreement, appeared to give effect to the purpose and object of the insolvency provisions under the CA. It also did not offend the grant of a mandatory stay to ensure that parties do not seek to resile from their obligation to arbitrate pursuant to an arbitration agreement. (paras 16 & 162)

(3) The AA did not purport to extend its reach to the insolvency provisions under the CA. Its provisions ought not to be invoked or incorporated into the exercise of discretion by the companies court in determining whether to grant a *Fortuna* injunction, or stay, dismiss or allow a winding-up petition. Any such step would be contrary to the purpose and object of the respective statutes. It followed that the legislative intent of the AA, in like manner, could not be extended from, or incorporated into, the CA. Neither the mandatory stay provisions in s. 10 of the AA nor the legislative intent underlying the AA may be invoked in the companies court when the latter was determining whether to allow, stay, restrain or dismiss a winding-up petition. If, in the course of exercising its discretion to stay, restrain, dismiss or allow a petition under s. 465 of the CA, the court was expected to give effect to the legislative intent in s. 10 of the AA, which in effect meant that where there was an arbitration agreement in relation to the debt underlying the petition, the companies court was bound to give effect to the s. 10 provision regarding a mandatory stay, notwithstanding that there was no such provision, express or implied to that effect in the CA. In other words, the debtor company became effectively entitled to a stay in much the

same manner as would an applicant for a stay under s. 10 of the AA, although the section was not applicable. The net result was that where the disputed debt fell within the purview of an arbitration agreement, a stay was almost inevitable given the low threshold applied.

(4) Where the disputed debt did not fall within the purview of an arbitration agreement, the debtor company had to achieve the higher standard of a debt disputed on substantial grounds. This in turn gave rise to an inconsistent practice in the companies court where petitions with arbitration agreements would be dealt with differently from petitions without. The importation of a lower threshold into the exercise of discretion by the companies court in adjudicating on a petition would render the exercise of discretion of such court under winding-up legislation, illusory. The winding-up process by its very nature did not seek to determine the underlying dispute between the petitioning creditor and the respondent to the winding-up petition. The determination of the existence and quantum of the debt was not the purpose of winding-up proceedings. The purpose was to ascertain whether the respondent or defendant to the winding-up petition was insolvent or otherwise, for the benefit of the body of unsecured creditors. It was a process of collective enforcement of debts by the body of unsecured creditors who would be prejudiced if an insolvent company was allowed to continue to operate despite being insolvent. To that end, its purpose and effect was entirely different from arbitration which sought to adjudicate on the debt itself to ascertain whether it was due or not. Indeed, it was because of this that the policies underlying the arbitration legislation were not offended by requiring a genuine and substantial dispute to be proven before preventing the commencement of winding-up proceedings. (para 162)

(5) Weight should be accorded to the fact that even where there was an arbitration agreement and parties ought to be held to their agreement, the primary focus of a winding-up petition was to ascertain a company's solvency or insolvency. Where insufficient weight was accorded to this factor, and greater weight was accorded to the need to hold the parties to their arbitration agreement, then the balance required between insolvency and arbitration was misaligned. A balance ought to be achieved in each case and this was best achieved by allowing the prevailing laws to apply respectively. (para 162)

(6) A primary reason put forward for applying the lower threshold was that a creditor who sought to use winding-up to enforce his debt rather than going through arbitration as he contracted to, was abusing the insolvency process. Where there was abuse arising in the form of the filing of a winding-up petition even where a debt was genuinely disputed and the

matter required adjudication in the courts or by way of arbitration, the remedy was to strike out the petition and to penalise the wrongful use of the winding-up process by way of indemnity costs. In most cases, it was usually evident that the creditor initiating the winding-up process was simply seeking to circumvent his contractual obligation to arbitrate the dispute, as was the case in this appeal. The proof of debt process would allow the claims of all creditors of an insolvent company to be given due consideration. It then remained open to the liquidator to proceed with arbitration, while all other creditors were protected too. (para 162)

(7) In applying a lower threshold or standard of review, the focus of the issue centred primarily on the parties to the arbitration, to the exclusion of other creditors whose interests would be adversely affected if the debtor company was in fact insolvent. This approach did not take into consideration the possibility of the debtor company whose debt fell within the purview of an arbitration agreement, actually being insolvent. If in fact the debtor was insolvent, and the arbitration proceeded, the effect on the body of unsecured creditors was adverse. What too if a creditor other than the one falling within the purview of the arbitration agreement initiated a winding-up petition? Following from the lower threshold reasoning, a different standard would fall to be applied, namely the conventional test of a genuinely disputed debt on a substantial basis. The application of different tests within a single area of law was not equitable, nor warranted where the issue for assessment was the same, namely whether the company was insolvent or not. For these reasons, *Sian* achieved the balance required in determining the threshold to be applied by the companies court when deciding whether to allow, restrain, stay or dismiss a petition premised on a debt which was disputed and the subject matter of an arbitration agreement – namely the higher threshold test of whether the debt was genuinely disputed on substantial grounds. (para 162)

(8) Although the distribution agreement stipulated that it was effectively a sale and purchase agreement of two medical devices between Swissray and the company, the conduct of the parties both prior to and after the signing of the distribution agreement was genuinely not clear whether it was an outright sale to the company or for the company to sell the same to the end-user/purchaser. Alternatively, there was a possibility of a waiver of the terms of the agreement by conduct; or the existence of a collateral contract. In other words, there was sufficient material evidence to warrant the court being satisfied that it was not a question of an undisputed debt that was being frivolously disputed. When the chronology and factual matrix was considered holistically, it was clear that there were no acknowledgements or admissions of a debt in the sum

of USD$158,413.75 which was the sum claimed in the statutory demand. Instead, any acknowledgements by the company related to payment of the deposit of the two medical devices, which was a far lesser sum than the full purchase price specified in the statutory demand. The Court of Appeal erred in treating the payment towards deposits as being equivalent to an admission of liability for the full purchase price. There was no termination of the agreement. Therefore, the sum claimed under statutory demand could not be said to be an accrued debt due to Swissray. The fact of the termination of Swissray, as the distributor for Novadaq medical devices, raised issues relating to Swissray's authorisation to even deal with these products as a seller. Its entitlement to receive the sum claimed in the statutory notice was put in issue when it advised the company to deliver the devices to a third-party company and negotiate any commission with that third party. The matters comprised sufficient basis to amount to a genuinely disputed debt on substantial grounds. As such, the liability for the debt had to be determined by way of arbitration as the dispute was subject to an arbitration agreement. (paras 165 & 167)

Bahasa Melayu *Headnotes*

Perayu, V Medical Services (M) Sdn Bhd ('syarikat'), sebuah syarikat yang diperbadankan di Malaysia, menjalankan perniagaan, antara lain, pengimportan, pengeksportan, perdagangan, pembelian, penjualan dan pembekalan alatan-alatan perubatan. Syarikat juga bertindak sebagai ejen dan sub-ejen bagi alatan-alatan tersebut. Responden pula, Swissray Asia Healthcare Co Ltd ('Swissray'), ialah sebuah syarikat asing yang diperbadankan di Taiwan. Swissray terlibat dalam sektor penyelidikan dan pembangunan, pembuatan, penjualan dan perkhidmatan berkaitan pengimejan perubatan. Syarikat dan Swissray telah memasuki satu perjanjian pengedaran. Swissray telah mengenal pasti Pusat Perubatan Universiti Malaya ('PPUM') sebagai bakal pelanggan dan pengguna akhir. Menurut Swissray, terdapat persetujuan antara pihak-pihak pada masa sebelum dan selepas perjanjian pengedaran itu ditandatangani. Persetujuan itu adalah, syarikat hanya dibenarkan membeli dua alatan perubatan selepas PPUM menjadi pengguna akhir atau pembeli bagi alatan-alatan itu. Syarikat telah mengeluarkan pesanan pembelian untuk alatan-alatan perubatan dengan nilai pesanan sebanyak USD213,500. Swissray mengatakan bahawa kedua-dua alatan perubatan itu hanyalah sebagai demonstrasi dan surat-menyurat antara pihak-pihak tidak menunjukkan syarikat adalah pengguna akhir mahupun pembeli. Setelah menerima kedua-dua alatan perubatan, syarikat menyerahkan alatan-alatan itu kepada PPUM. Susulan itu, Swissray menghantar satu invois proforma berjumlah USD200,000. Namun, syarikat hanya membayar sebanyak USD20,000. Syarikat mendakwa bahawa Swissray telah secara lisan memberitahu perjanjian pengedaran akan

ditamatkan. Syarikat seterusnya mengeluarkan satu surat mengakui tentang penamatan dan memohon pemulangan USD20,000 yang telah dibayar. Pada masa itu, terdapat perbincangan tentang pemerolehan Novadaq yang bakal dilakukan oleh Stryker Corporation ('Stryker'). Syarikat hanya mengetahui tentang fakta pemerolehan itu apabila Stryker dihubungi tentang kedua-dua alatan perubatan. Stryker membalas dengan mempersoalkan hak syarikat untuk berurusan dengan kedua-dua alatan perubatan. Selepas itu, Swissray menawarkan tiga pilihan kepada syarikat – pertama, syarikat dikehendaki membeli kedua-dua peralatan perubatan dengan pembayaran penuh. Tentang pilihan-pilihan lain, syarikat diminta menyerahkan pemunyaannya atas kedua-dua alatan perubatan pada tarikh-tarikh yang berbeza. Berdasarkan perkara tersebut, jelas tiada penamatan yang telah dimuktamadkan, tiada jumlah yang telah ditentukan sebagai isu dan pihak-pihak sebenarnya masih dalam perbincangan. Bersandarkan pada perbincangan dengan Swissray dan kebarangkalian penjualan dengan PPUM, syarikat membuat dua pembayaran lanjutan sebanyak USD20,000 setiap satu. Walau bagaimanapun, Stryker mengesahkan bahawa Swissray bukanlah pengedar yang sah bagi produk-produk Novadaq bagi mana-mana negara. Berikutan penamatan Swissray sebagai pengedar Novadaq, syarikat memberhentikan pembayaran serta menegaskan tiada apa-apa pembayaran akan dibuat kepada Swissray lagi. Syarikat seterusnya memohon satu surat untuk pengesahan bahawa Swissray adalah pihak yang betul bagi urusan pembelian kedua-dua alatan perubatan. Swissray kemudian memberitahu bahawa surat itu tidak boleh dikeluarkan dan Swissray sedang dalam proses menghantar surat kepada Stryker untuk mendapatkan pampasan. Swissray mencadangkan agar syarikat menjaga hubungannya dengan Stryker. Syarikat kemudian memohon bantuan Stryker untuk menyelesaikan penjualan kepada PPUM serta perkara ini. Namun, usaha ini menemukan jalan buntu. Swissray meminta agar harga belian penuh untuk kedua-dua unit demonstrasi alatan perubatan diselesaikan oleh syarikat. Swissray menegaskan bahawa keseluruhan harga belian adalah hutang tertunggak yang perlu diselesaikan dan bertindak menyampaikan satu notis tuntutan terhadap syarikat. Sekiranya syarikat gagal untuk membayar jumlah yang dinyatakan dalam notis itu, satu petisyen penggulungan akan difailkan terhadap syarikat. Maka syarikat memfailkan satu permohonan kepada Mahkamah Tinggi untuk injunksi *Fortuna* terhadap Swissray untuk menghalang mereka memulakan perbicaraan penggulungan. Mahkamah Tinggi membenarkan permohonan, dengan mengguna pakai ujian ambang yang lebih rendah seperti yang dinyatakan dalam *Salford Estates (No. 2) Ltd v. Altomart Ltd (No. 2)* ('*Salford*'). Swissray merayu ke Mahkamah Rayuan terhadap pemberian injunksi *Fortuna* oleh Mahkamah Tinggi. Mahkamah Rayuan memilih untuk tidak mengikut ujian 'ambang yang lebih rendah' yang disebut dalam *Salford*, atas alasan ambang yang lebih tinggi terpakai dalam perbicaraan penggulungan, iaitu kewujudan 'pertikaian tulen atau *bona*

fide', yang merupakan ujian yang lebih sesuai untuk diikuti dalam menentukan sama ada petisyen penggulungan boleh dibenarkan, ditangguh atau ditolak. Sehubungan itu, rayuan ini. Isu yang timbul adalah apakah ujian yang perlu diikuti apabila defendan dalam petisyen penggulungan, mempersoalkan tentang hutang yang menjadi asas dalam petisyen penggulungan, tetapi pertikaian tentang hutang tersebut jatuh bawah ruang lingkup perjanjian timbang tara.

Diputuskan (membenarkan rayuan; mengembalikan injunksi *Fortuna* yang dibenarkan Mahkamah Tinggi)
Oleh Nallini Pathmanathan HMP menyampaikan penghakiman mahkamah:

(1) Mahkamah syarikat telah menentukan sama ada penghutang adalah tidak solven bagi melaksanakan sistem kolektif dan koperasi yang akan membolehkan aset dibahagikan secara teratur kepada pemiutang-pemiutang berdasarkan kelayakan mereka secara *pari passu*. Mahkamah syarikat tidak mengadili pertikaian yang menjadi hal perkara perjanjian timbang tara tetapi meneliti dan menentukan isu yang berbeza, iaitu sama ada defendan syarikat adalah tidak solven. Tidak munasabah untuk mengimport peruntukan-peruntukan statutori atau niat perundangan Akta Timbang Tara 2005 ('Akta Timbang Tara') ke dalam peruntukan-peruntukan statutori yang mengawal selia petisyen penggulungan bawah Akta Syarikat 2016 ('Akta Syarikat'). Apabila terdapat dua Akta yang komposit dan berbeza, mereka hendaklah ditafsir dan dipakai dalam ruang lingkup konteks mereka. Pengimportan mana-mana peruntukan statutori daripada mana-mana Akta yang tidak berkaitan, atau berbeza antara satu sama lain, tidak boleh diterima. Kecuali dalam situasi-situasi tertentu, sesuatu Akta hendaklah ditafsir mengikut terma-termanya sendiri dan bukan mengikut terma mana-mana Akta yang lain. Lantaran itu, jika mana-mana peruntukan statutori tidak boleh dipakai secara bertukar ganti dengan mana-mana Akta yang berasingan dan berbeza, niat perundangan juga tidak boleh disertakan daripada satu Akta ke dalam satu Akta yang lain.

(2) Mahkamah ini mengikut keputusan dalam *Sian Participation Corp (In Liquidation) v. Halimeda International Ltd* ('*Sian*') kerana pendekatan yang diambil dalam kes itu telah menjelaskan undang-undang di samping memberikan pertimbangan yang bebas kepada timbang tara dan ketaksolvenan. Pemakaian ujian yang digunakan secara konvensional dalam prosiding ketaksolvenan, iaitu hanya apabila hutang yang benar-benar dipertikaikan berdasarkan alasan-alasan yang sangat jelas diwujudkan, barulah petisyen penggulungan boleh ditangguhkan, walaupun terdapat perjanjian timbang tara, dapat menyebabkan tujuan dan objektif peruntukan-peruntukan ketaksolvenan bawah Akta Syarikat

tercapai. Itu juga tidak mengganggu pemberian penangguhan mandatori bagi memastikan pihak-pihak tidak memungkiri kewajipan mereka untuk menimbang tara bawah perjanjian timbang tara.

(3) Akta Timbang Tara tidak bermatlamat untuk memanjangkan pemakaiannya pada peruntukan-peruntukan ketaksolvenan bawah Akta Syarikat. Peruntukan-peruntukan itu tidak boleh digunakan dalam penggunaan budi bicara oleh mahkamah syarikat dalam menentukan sama ada injunksi *Fortuna*, penangguhan, penolakan atau petisyen penggulungan wajar dibenarkan. Apa-apa langkah sebegitu adalah bertentangan dengan tujuan dan matlamat Akta-Akta tersebut. Berikutan itu, niat perundangan Akta Timbang Tara, dalam cara serupa, tidak boleh dipanjangkan daripada, atau digunakan pada Akta Syarikat. Itu termasuk peruntukan-peruntukan penangguhan mandatori bawah s. 10 Akta Timbang Tara dan niat perundangan Akta itu juga tidak boleh dibangkitkan dalam mahkamah syarikat semasa mahkamah itu sedang menentukan sama ada petisyen penggulungan boleh dibenarkan, ditangguhkan, dihalang atau ditolak. Jika dalam menggunakan budi bicara untuk menangguhkan, menghalang, menolak atau membenarkan petisyen bawah s. 465 Akta Syarikat, mahkamah dijangkakan perlu untuk memberikan kesan pada niat perundangan s. 10 Akta Timbang Tara, yang bermaksud terdapat perjanjian timbang tara berkaitan hutang bawah petisyen, mahkamah syarikat adalah terikat untuk memberikan kesan pada peruntukan-peruntukan s. 10 tentang penangguhan mandatori, walaupun tiada peruntukan sebegitu secara tersurat atau tersirat bawah Akta Syarikat. Dalam erti kata lain, syarikat penghutang adalah berhak atas penangguhan sama seperti mana-mana pemohon yang memohon untuk penangguhan bawah s. 10 Akta Timbang Tara, walaupun seksyen itu tidak terpakai. Hasilnya, jika hutang yang dipertikaikan termasuk dalam ruang lingkup perjanjian timbang tara, penangguhan tidak boleh dielakkan memandangkan ambang yang rendah terpakai.

(4) Jika hutang yang dipertikaikan tidak termasuk dalam ruang lingkup perjanjian timbang tara, penghutang syarikat hendaklah mencapai standard hutang yang dipertikai yang lebih tinggi atas alasan-alasan substansial. Ini akan mengakibatkan amalan yang tidak konsisten dalam mahkamah syarikat di mana petisyen-petisyen dan perjanjian-perjanjian timbang tara akan diuruskan secara berbeza dengan petisyen-petisyen tanpa perjanjian-perjanjian timbang tara. Pemakaian ambang yang lebih rendah dalam penggunaan budi bicara oleh mahkamah syarikat dalam mendengar petisyen akan membuatkan penggunaan budi bicara bawah perundangan penggulungan itu menjadi ilusi. Proses penggulungan memiliki sifat tidak menentukan pertikaian antara pemiutang yang memulakan petisyen dan responden dalam petisyen penggulungan. Penentuan kewujudan dan kuantum hutang bukanlah tujuan petisyen

penggulungan. Tujuannya adalah untuk mengesahkan sama ada responden atau defendan dalam petisyen penggulungan adalah tak solven atau sebaliknya, demi kebaikan badan pemiutang tidak bercagar. Itu adalah proses penguatkuasaan hutang secara kolektif oleh badan pemiutang tidak bercagar yang akan diprejudis sekiranya mana-mana syarikat tak solven dibenarkan untuk meneruskan operasinya walaupun tidak solven. Berikutan itu, tujuan dan kesannya secara keseluruhan adalah berbeza berbanding timbang tara yang akan mengadili hutang itu demi mengesahkan sama ada hutang itu perlu dibayar atau tidak. Oleh kerana itulah polisi-polisi berkenaan perundangan timbang tara tidak akan terkesan walaupun syarat diletakkan, iaitu perlu dibuktikan terlebih dahulu bahawa terdapat pertikaian yang sah dan substansial sebelum prosiding penggulungan boleh dihalang.

(5) Penimbangan harus diberikan pada fakta walaupun terdapat perjanjian timbang tara dan pihak-pihak haruslah terikat pada perjanjian mereka, fokus utama petisyen penggulungan adalah untuk mengesahkan sama ada syarikat adalah solven ataupun tidak. Jika penimbangan yang tidak mencukupi diberikan pada faktor ini, dan penimbangan yang lebih berat diberikan pada keperluan untuk mengikat pihak-pihak pada perjanjian timbang tara, keseimbangan yang diperlukan antara ketaksolvenan dan timbang tara akan menjadi tidak sejajar. Keseimbangan perlu dicapai dalam setiap kes dan cara yang terbaik untuk mencapainya adalah dengan membenarkan undang-undang yang berkuat kuasa dipakai secara berasingan.

(6) Alasan utama yang diketengahkan bagi pemakaian ambang yang lebih rendah adalah pemiutang yang memohon untuk penggulungan demi menguatkuasakan hutangnya berbanding menjalani timbang tara seperti yang telah dipersetujuinya, adalah penggunaan salah proses ketaksolvenan. Apabila timbul penyalahgunaan dalam bentuk pemfailan petisyen penggulungan walaupun terdapat pertikaian yang sah berkaitan perkara yang memerlukan penghakiman di mahkamah atau timbang tara, remedi yang bersesuaian adalah pembatalan petisyen dan hukuman untuk penggunaan salah proses penggulungan melalui kos indemniti. Dalam kebanyakan kes, telah menjadi kebiasaan bagi pemiutang untuk memulakan proses penggulungan hanya kerana mereka ingin memintas kewajipan kontraktual mereka untuk menimbang tara pertikaian, seperti dalam kes ini. Proses pembuktian hutang akan membolehkan tuntutan semua pemiutang syarikat tidak solven diberikan pertimbangan yang sewajarnya. Itu akan tetap membuka ruang untuk pelikuidasi meneruskan timbang tara, di samping melindungi pemiutang yang lain.

(7) Dalam memakai ambang yang rendah atau standard semakan, fokus pada isu secara utamanya tertumpu pada pihak-pihak dalam timbang tara, yang akan mengecualikan pemiutang lain yang kepentingannya akan terjejas teruk sekiranya penghutang syarikat benar-benar tidak solven. Pendekatan ini tidak mengambil kira kemungkinan penghutang syarikat yang memiliki hutang yang termasuk dalam ruang lingkup perjanjian timbang tara, sebenarnya adalah tidak solven. Jika benar penghutang adalah solven, dan timbang tara diteruskan, kesan yang teruk akan menanti badan pemiutang tidak bercagar. Bagaimana jika pemiutang selain daripada pemiutang yang termasuk dalam ruang lingkup perjanjian timbang tara turut memulakan petisyen penggulungan? Susulan alasan penggunaan ambang yang lebih rendah, ujian konvensional, iaitu hutang yang benar-benar dipertikaikan berdasarkan alasan substansial, yang merupakan standard yang berbeza, akan dipakai. Pemakaian ujian-ujian yang berbeza dalam satu bidang undang-undang adalah tidak saksama, mahupun digalakkan jika isu yang perlu ditentukan adalah sama, iaitu sama ada syarikat adalah solven ataupun tidak. Berdasarkan alasan ini, *Sian* telah mencapai keseimbangan yang diperlukan dalam menentukan ambang yang harus dipakai oleh mahkamah syarikat dalam memutuskan sama ada ingin membenarkan, menghalang, menangguh atau menolak petisyen yang berdasarkan hutang yang dipertikai dan hal perkara perjanjian timbang tara – iaitu ujian ambang yang lebih tinggi sama ada hutang benar-benar dipertikaikan atas alasan substansial.

(8) Walaupun perjanjian pengedaran mengatakan itu adalah perjanjian jual beli melibatkan dua alatan perubatan antara Swissray dan syarikat, kelakuan pihak-pihak pada masa sebelum atau selepas perjanjian pengedaran itu ditandatangani, tidak menjelaskan sama ada itu adalah penjualan secara langsung atau untuk syarikat menjual alatan-alatan itu pada pengguna akhir/pembeli. Secara alternatif, terdapat kemungkinan terma-terma perjanjian melalui perbuatan diketepikan; atau kewujudan perjanjian kolateral. Dalam erti kata lain, terdapat keterangan yang mencukupi untuk mahkamah berpuas hati bahawa ini bukanlah soalan tentang hutang yang tidak dipertikai yang telah dipertikai secara remeh. Apabila kronologi dan matriks fakta dipertimbangkan secara holistik, jelas bahawa tidak terdapat pengakuan terhadap hutang yang berjumlah USD$158,413.75 yang merupakan jumlah yang dituntut dalam tuntutan statutori. Pengakuan-pengakuan daripada syarikat, berkaitan pembayaran deposit kedua-dua alatan perubatan, melibatkan jumlah yang lebih kecil berbanding harga belian penuh yang dinyatakan dalam tuntutan statutori. Mahkamah Rayuan terkhilaf apabila memperlakukan pembayaran untuk deposit sebagai bersamaan dengan pengakuan tanggungan untuk harga belian penuh. Tiada penamatan perjanjian. Oleh itu, jumlah yang dituntut bawah tuntutan statutori tidak boleh dikatakan

hutang terakru yang perlu dibayar oleh Swissray. Fakta tentang penamatan Swissray sebagai pengedar alatan-alatan perubatan Novadaq, menimbulkan isu tentang hak Swissray untuk berurusan dengan alatan-alatan itu sebagai penjual. Hak Swissray untuk menerima jumlah yang dituntut dalam tuntutan statutori dipersoalkan apabila Swissray menasihati syarikat untuk menghantar alatan-alatan perubatan kepada syarikat pihak ketiga dan berbincang tentang apa-apa komisen dengan pihak ketiga tersebut. Perkara-perkara itu terjumlah kepada hutang yang benar-benar dipertikaikan atas alasan-alasan substansial. Sehubungan itu, tanggungan untuk hutang hendaklah ditentukan melalui timbang tara kerana pertikaian dalam kes ini tertakluk pada perjanjian timbang tara.

Case(s) referred to:

AnAn Group (Singapore) Pte Ltd v. VTB Bank (Public Joint Stock Company) [2020] SGCA 33 ***(refd)***

Awangsa Bina Sdn Bhd v. Mayland Avenue Sdn Bhd [2019] CLJU 590; [2019] 1 LNS 590 HC ***(refd)***

BDG v. BDH [2016] 5 SLR 977 ***(refd)***

Brown v. Bennett (No 2) [2002] 1 WLR 713 ***(refd)***

Bryanstan Finance Ltd v. De Vries (No 2) [1976] 3 WLR 41 ***(refd)***

But Ka Chon v. Interactive Brokers LLC [2019] HKCA 87 ***(refd)***

BWF v. BWG [2019] SVHC 81 ***(refd)***

Dayang (HK) Marine Shipping Co Limited v. Asia Master Logistics Limited [2020] HKCFI ***(refd)***

Fortuna Holdings Pty Ltd v. The Deputy Commissioner Of Taxation Of The Commonwealth Of Australia [1978] VR 83 ***(refd)***

Founder Group (Hong Kong) Ltd (In Liquidation) v. Singapore JHC Co Pte Ltd [2023] 2 SLR 554 ***(refd)***

Konsortium Express Sdn Bhd v. Embition Sdn Bhd [2025] MLJU 199 ***(refd)***

Ladd v. Marshall 3 All ER 745 ***(refd)***

Larsen Oil And Gas Pte Ltd v. Petropod Ltd (In Liquidation) And In Compulsory Liquidation In Singapore [2011] SGCA 21 ***(refd)***

Mann v. Goldstein [1968] 1 WLR 1091 ***(refd)***

Megasteel Sdn Bhd v. Perwaja Steel Sdn Bhd [2008] 4 CLJ 352 CA ***(refd)***

Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd [2007] 3 CLJ 295 CA ***(refd)***

NFC Labuan Shipleasing Ltd v. Semua Chemical Shipping Sdn Bhd [2017] CLJU 943; [2017] 1 LNS 943 HC ***(refd)***

Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***

Re A Company [1894] 1 Ch 349 ***(refd)***

Re Southwest Pacific Bauxite (HK) Ltd [2018] 2 HKLRD 449 ***(refd)***

Salford Estates (No 2) Ltd v. Altomart Ltd (No 2) [2014] EWCA Civ 1575 ***(refd)***

Sapura Fabrication Sdn Bhd & Ors v. GAS [2024] SGHC 241 ***(refd)***

Sian Participation Corp (In Liquidation v. Halimeda International Ltd [2024] UKPC 16 ***(refd)***

Stonegate Securities Ltd v. Gregory [1980] 1 All ER 241 ***(refd)***

Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd [2007] 2 CLJ 305 CA ***(refd)***

V Medical Services M Sdn Bhd v. Swissray Asia Healthcare Co Ltd [2022] 10 CLJ 313 HC ***(refd)***

WBF v. BWG [2019] SGHC 81 ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 2(1), 10(1), 18
Companies Act 2016, ss. 465(1)(e), 466(1)(a), 492
Interpretation Acts 1948 and 1976, s. 17A
Rules of the Court of Appeal 1994, r. 7(3A)
Rules of the Federal Court 1995, r. 3

Arbitration Act 1996 [UK], s. 9
Insolvency Act 1986 [UK], s. 122(1)

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For the respondent - Chuah Jo-Shua & Surein Wei; M/s Zaid Ibrahim & Co

[Editor's note: For the Court of Appeal judgment, please see Swissray Asia Healthcare Co Ltd v. V Medical Services M Sdn Bhd [2024] 8 CLJ 21 (overruled); For the High Court judgment, please see V Medical Services M Sdn Bhd v. Swissray Asia Healthcare Co Ltd [2022] 10 CLJ 313 (affirmed).]

Reported by Lina E & Syamim Ariffin

JUDGMENT

Nallini Pathmanathan FCJ:

Introduction

[1] The evolution and expansion of commercial arbitration globally have brought to the fore conflicts between arbitration and other areas of the law. The present appeal relates to the tension between the winding-up process in insolvency and arbitration when the debt which comprises the basis for the winding-up petition is subject to an arbitration clause.

[2] In the instant case, the appellant, V Medical Services (M) Sdn Bhd ('the company') sought a *Fortuna* injunction to restrain Swissray Asia Healthcare Co Ltd ('Swissray') from bringing a winding-up petition on the grounds that there subsisted a dispute in relation to the debt which comprised the subject matter of the winding-up petition.

[3] The core of the company's argument was that in light of the subsistence of an arbitration clause in relation to the debt founding the basis for the winding-up petition, the applicable test to determine whether a *Fortuna* or restraining injunction ought to be granted to preclude the presentation of the winding-up petition, and defer/accede to arbitration, was the lower-threshold test enunciated in *Salford Estates (No 2) Ltd v. Altomart Ltd (No 2)* [2014] EWCA Civ 1575 ('*Salford*'). The test in *Salford* prescribes that the winding-up court should, save in wholly exceptional cases, exercise its discretion consistently with the legislative policy embodied in the statute relating to arbitration, such that upon a *prima facie* consideration of the matter, if it appears that the debt is denied or disputed simpliciter, then the

matter ought to proceed to arbitration, in accordance with the agreement made between the parties. This is a lower standard of review than that conventionally applied in the court hearing the winding-up petition ('companies court') when adjudicating on winding-up.

[4] In response to the company's claim for a *Fortuna* injunction, Swissray countered the test in *Salford*, maintaining that the proper test to be utilised was the conventional test long applied in winding-up proceedings – namely the existence of a disputed debt on genuine and substantial grounds. However, in the instant case, Swissray further contended that in light of clear admissions and acknowledgements, there was no genuine dispute as to the existence of the debt. As such, Swissray maintained that the winding-up petition should proceed, notwithstanding the existence of an arbitration clause.

[5] The approach in the companies court, when exercising its powers under the winding-up regime, is that the existence of an arbitration clause/agreement ought not, of itself, interfere with the threshold test applied in the winding-up regime, namely that a debt which is genuinely disputed on substantial grounds is sufficient basis for the grant of a *Fortuna* or restraining injunction or the stay or dismissal of a winding-up petition. This is a higher threshold than that enunciated in *Salford*. It envisages a greater judicial scrutiny of the debt comprising the basis for the winding-up petition. The test is whether the debt is genuinely disputed on substantial grounds (see *Stonegate Securities Ltd v. Gregory* [1980] 1 All ER 241) ('*Stonegate*').

[6] *Salford* on the other hand, pronounces minimal curial consideration or intervention, in line with the policy articulated in the legislation relating to arbitration. The net result is that a denial of the debt *simpliciter* may well be sufficient to warrant the exercise of the court's discretion in favour of arbitration, such that a winding-up petition is stayed, dismissed or an injunction prohibiting the initiation of a winding-up petition is allowed.

[7] To that extent, the approach adopted appears to give rise to tension between the winding-up regime and arbitration, because the threshold tests in each are different.

[8] For the purposes of this appeal, the precise issue that arises for consideration is this:

> What is the test a Court should adopt when a defendant in a winding-up petition, disputes the existence of the debt which comprises the basis for the winding-up petition, but the dispute relating to such debt falls within the scope of an arbitration agreement?

[9] Courts in different jurisdictions have dealt with this issue, but in differing ways such that there is no one unified approach. Many jurisdictions followed the decision in *Salford*, holding that where such an arbitration

clause/agreement subsists, the winding-up petition should be stayed or dismissed. This is particularly so in relation to international arbitration. This test is essentially lower than that enunciated traditionally in the companies court

[10] Under the position in *Salford*, a court should exercise its discretion to stay or dismiss a petition where there is a '*prima facie*' dispute as to the debt that is subject to resolution *vide* arbitration. It is sufficient that the debt which is the subject matter of the arbitration is basically disputed. If so disputed, the matter is to be referred to arbitration in accordance with the legislative intent of the arbitration regime.

[11] The rationale behind this, *inter alia*, is that the creditor who initiated the petition ought to be held to his contractual obligation to have the matter determined by arbitration, and ought not to have recourse to the winding-up court to enforce his claim, by circumventing his obligation to refer the matter to arbitration. This argument is further fortified by the major policy values of arbitration, party autonomy, *pacta sunt servanda* and efficiency. This will be considered further in the body of this judgment.

[12] The position adopted in *Salford* is in contrast to the traditionally applied test in the companies court, namely that where the debt comprising the subject matter of the winding-up petition is disputed on genuine and substantial grounds then the petition to wind up should be stayed or dismissed (see *Mann v. Goldstein* [1968] 1 WLR 1091 and *Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd* [2007] 2 CLJ 305; [2007] 4 MLJ 355 ('*Tan Kok Tong*')). This is clearly a higher test as it entails a consideration of whether the subject debt is disputed on a genuine and substantive basis, as opposed to being a basic denial of the claim. In other words, the basis and merits of the claim fall to be considered, not for the purposes of determining the claim but for a different purpose, namely to determine whether the company is in fact 'insolvent' as defined under the relevant insolvency statute.

[13] By invoking and applying the policy of the arbitration legislation in the exercise of discretion by the companies court, when determining whether or not to wind up a company on the grounds of a disputed debt, which is governed in turn by insolvency legislation, the traditionally established principles on which the exercise of such discretion is governed, is altered. The threshold standard to dismiss or stay such a petition is lowered. The imposition of the arbitration policy or legislative intent in a winding-up petition interferes with and encroaches upon the exercise of discretion on winding-up which is governed by separate legislation specifically catered to deal with the disparate needs of insolvency.

[14] Multiple jurisdictions have dealt with this problem and have adopted directly contrasting approaches. Some jurisdictions have adopted an approach with a preference for arbitration law while others have adopted a more insolvency-based approach to the resolution of this issue. The differing reasoning may be attributed to a preference between the values of arbitration and insolvency and to an extent can be said to be policy driven.

[15] Until very recently, many common law jurisdictions adopted the test in *Salford* and lowered the threshold test for grant of a stay, dismissal or a *Fortuna* injunction in cases where the debt in issue was subject to an arbitration clause. This meant, practically speaking, that it was sufficient for a debt to be denied simpliciter, for the petition to be stayed, dismissed or for the grant of a *Fortuna* injunction precluding the presentation of the petition. Other jurisdictions expressed some degree of reservation or declined to follow the lower threshold test in *Salford*.

[16] The latest development in this aspect of the law is the decision of the Privy Council in *Sian Participation Corp (In Liquidation v. Halimeda International Ltd* [2024] UKPC 16) ('*Sian*'). The Privy Council hearing an appeal from the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands) held that *Salford* was wrongly decided and provided extensive reasoning for the same. In essence, the board held that where an insubstantial dispute about the creditor's debt is raised between parties to an arbitration agreement it was wrong to introduce a discretionary stay of creditors' petitions.

[17] A creditor's winding-up petition does not trigger a mandatory stay provided for in art. 8 of the model law or the various statutory provisions incorporated in various jurisdictions for such a mandatory stay, such as s. 10 of our Arbitration Act 2005 ('AA'). And that, in turn, is because a winding-up petition is not a type of claim caught by those provisions, because it does not determine or resolve with any finality the existence or otherwise of the subject debt. It was pointed out that a winding-up petition is a process which exists for the benefit of a class rather than an individual creditor or petitioner. It triggers a statutory process which has evolved over time to ensure an efficient realisation of the company's assets and their fair distribution, on a *pari passu* basis between unsecured creditors. This is in the public interest.

[18] While arbitration is a private adjudication process between parties with a view to resolving with some degree of finality the dispute between the parties. The process results in the resolution of disputed rights and provides remedies between the parties, which a winding-up does not. Accordingly, the policy considerations of both statutes are separate and discrete and ought not to be conflated. These issues will be dealt with in greater detail below.

[19] In the course of adjudicating on this appeal, the issue of whether *Salford* or *Sian* (or some other test) was the proper course to follow in this jurisdiction, fell for determination. Having heard the appeal on 21 January 2025, we concluded that the test and reasoning in *Sian* is the correct approach to adopt in Malaysia. To that extent we concur with the decision of the Court of Appeal on this important legal issue.

[20] However, in light of both a holistic review of the factual matrix as well as a consideration of fresh evidence adduced at the Federal Court level, we found that there was a genuine debt which was disputed on substantial grounds. In so concluding, we applied the higher threshold test for insolvency proceedings under the Companies Act 2016 ('CA'), as propounded in *Sian*. Accordingly, we reinstated the decision of the High Court granting the *Fortuna* injunction and referring the matter to arbitration. We now explain our reasons for so concluding in this judgment.

The Background Facts And Procedural History

[21] As stated at the outset, the company who is the appellant, V Medical Services Sdn Bhd ('the company') is a company incorporated in Malaysia. It is in the business of, *inter alia*, importing, exporting, trading, buying, selling, supplying, and acting as agents and sub-agents for medical equipment. It is the respondent in the winding-up proceedings initiated by Swissway.

[22] The petitioner in the winding-up proceedings is Swissray Asia Healthcare Co Ltd, which is the respondent in this appeal. It is a foreign company, incorporated in Taiwan. It is involved in research and development, manufacture, sales and service of Medical Imaging.

[23] The crux of the dispute between Swissray and the company concerns a claim by the petitioner that the company owes it a debt in the sum of USD$158,413.75 for the sale of two medical devices, under the brand name 'Novadaq' and in respect of which the creditor initially had a right to distribute worldwide.

[24] In or around August 2015, the parties met during a world congress of surgery in Bangkok, Thailand where the petitioner introduced itself as the manufacturer and distributor of medical devices under the brand name 'Novadaq'. Following the exchange of correspondence between the company and Swissray, they entered into a mutual non-disclosure agreement dated 1 October 2024 to facilitate the appointment of the company as the distributor of Swissray's medical devices.

[25] In December 2015, while the finalisation of the distribution agreement was still pending, the company advised Swissray that as the proposed medical devices were new to the Malaysian market it would require time to

convince customers to purchase the same. Additionally, the economic climate in Malaysia at the time was unfavourable. The company suggested using the devices as demonstration units for a trial period.

[26] Swissray responded assuring the company that the units were demonstration units and would include a buy-back plan, thereby minimising the company's risk. Payment would be due after approval had been obtained from the Medical Device Authority (MDA). The company responded saying it would like to move forward with the relationship.

[27] The distribution agreement was signed between the parties on 1 April 2016. Its salient terms include:

(i) the relationship between Swissray and the company was described as that of an independent contractor where the company is responsible for distributing, selling and servicing the products in its own name, on its own behalf and its own risk and expense (see cl. 3.1);

(ii) either party may terminate the distribution agreement immediately by providing written notice to the other party. To that end the company explicitly waives any right to compensation or indemnity resulting from the termination of the agreement (see cl. 18.3);

(iii) an arbitration clause which provides:

> *All disputes arising in connection with this Agreement shall be finally settled by arbitration. The arbitration shall be held in Zurich, Switzerland and shall be conducted in accordance wi th the Swiss rules of International Arbitration (www.swissarbitration.ch).* The award rendered by the arbitrators shall be binding upon the Parties and may be entered in any court having jurisdiction thereof. This provision shall expressly survive termination of this Agreement. (emphasis added)

(iv) a foreign law clause (cl. 26.7):

> **Governing Law:**
>
> This Agreement and the rights and obligations of the parties hereunder shall be governed by and interpreted in accordance with Swiss law. The UN Convention on Contracts for the International Sale of Goods (CISG) is not applicable.

[28] In 2016, Swissray identified a potential customer and enduser University of Malaya Medical Centre ('UMMC'). The Sales and Marketing Director of Swissray at that time states, one Mr Thawichai, states that there was an understanding between the parties both pre and post the signing of the distribution agreement, that a purchase of the two medical devices by the appellant was conditional upon UMMC becoming the end-user or purchaser of the devices.

[29] On 9 May 2016, Swissray sent an email providing two quotations. One of them was for, in Swissray's words, 'two demo machines '. On the same day, the company issued a purchase order for the machines in question. The order value amounted to USD213,500. On 12 May 2016, Swissray reiterated that the two machines were for demonstration in its email apologising for the delay in shipping. The correspondence indicated that the company was not the end-user or purchaser.

[30] The company received the two medical devices on 24 May 2016 and delivered the same to the ultimate client UMMC between July and August 2016.

[31] On 11 August 2016, Swissray issued a proforma invoice dated 13 May 2016 in the sum of USD200,000. In response, on 9 September 2016 the company acknowledged that they had not paid the requisite deposit and said that they would do so by the end of the month. It is pertinent that the acknowledgement here is in respect of the deposit and not the entire sum. The company further stated: '… please understand machine of this value will take at least one to two years for hospital to purchase. Meanwhile I can't be paying immediately.'

[32] Swissray then sent an email on 15 September 2016 asking that the company pay the deposit by the end of the week 'as a courtesy to honour payment term that they previously agreed to and to establish mutual interest for our smooth future business practice.'

[33] On 23 September 2016, the company made a payment of USD20,000. This was followed by Swissray issuing a second invoice. The company then promised to release the payment of the deposit in the first week of January but failed to do so.

[34] The company alleges that Swissray verbally advised them that it was terminating the distributor agreement. In anticipation of the same, the company issued a letter acknowledging the termination and asking for a refund of the USD20,000 paid.

[35] At this time, there were discussions about an intended acquisition of Novadaq by Stryker Corporation. Swissray knew of this and there was discussion between Stryker and Swissray. However, Swissray did not inform the company of this intended acquisition of Novadaq.

[36] Swissray issued a written notice of termination on 30 August 2017, advising that the two medical devices were to be delivered to a third-party, Abex. Any dealing regarding the devices and the discussion of the percentage the company would receive as commission for the sale of the devices was to be negotiated directly with Abex.

[37] On 1 September 2017, an announcement was made that an acquisition of Novadaq by Stryker was complete. This would naturally have an impact on the distributorship of the two medical devices. As a result of such acquisition, it was not clear whether Swissray still enjoyed the capacity or authority to deal with 'Novadaq' devices.

[38] The company only discovered the fact of the acquisition in late September 2017, when it approached Stryker regarding the two medical devices. Stryker responded by questioning the rights of dealing with the two medical devices. This was a further factor which complicated matters.

[39] On 28 September 2017, Swissray responded to the company's letter dated 18 August 2017 and offered the company three options – the first being an outright purchase by the company, which would require the payment of the full purchase price. The other two options were the surrender of ownership of the two medical devices on different dates.

[40] It is apparent from the above events that there was no concluded termination, no exact sum determined to be in issue and parties were still negotiating.

[41] This is further evidenced by the fact that the parties subsequently met up on 18 October 2017 to try and resolve the situation. The content of this discussion is disputed because the appellant maintains that Swissray captured only partly what was discussed during the meeting, and stated the position incorrectly.

[42] Mr Thawichai, the then representative of Swissray purported to document the above meeting in an email of the same day, suggesting that the company owed Swissray the balance of the purchase sum. This is denied by the company. However, the company did not refute these matters in writing because when it sought to do so, its director was assured by Mr Thawichai that the mail was required to 'comfort' the board of directors and its finance team. He urged the company to do its best to sell the devices.

[43] The truth of Mr Thawichai's oral statements is set out in his subsequent affidavit, which was allowed as fresh evidence before us. Mr Thawichai states there that:

(i) the parties met to explore an amicable solution post termination;

(ii) the company through its director, Mr Vijayen maintained that there was still the possibility of a sale to materialise with the client, UMMC;

(iii) Mr Thawichai suggested that some payment be made for the demonstration units. He proposed a further payment of USD$20,000; and

(iv) subsequently another payment of USD$20,000 was further suggested by Mr Thawichai. These two payments were subsequently made by the company to Swissray.

[44] Mr Thawichai also confirmed that the payment of USD$180,000 being the purchase price of the two demonstration units was at all times conditional upon the purchase of the two medical devices by UMMC – a purchase which never materialised. What was agreed on was that the parties were to continue with their arrangement. It would therefore appear that parties had, by conduct, agreed to waive the termination.

[45] The hopes of a sale to UMMC were bolstered when the company was informed that the sale of the two medical devices had been submitted to their board and they were optimistic that it would be approved by June 2018. Swissray was advised of this and again they sought payment from the company.

[46] In summary, it was in reliance on the discussion between Mr Thawichai for Swissray and Mr Vijayan for the company, as well as the hopes of a prospective sale with UMMC, that the company, on 27 December 2017, and then on 2 March 2018, made two further payments of USD20,000 each. To that extent, it is difficult to state with certainty that this amounted to clear admissions or acknowledgements of the existence of a debt for the purchase of two medical devices at USD$180,000.

[47] Both before and after this, Swissray issued emails seeking further payment of monies for shipping costs as well. On 30 October 2017, it even issued a new invoice which was dated retrospectively to 26 May 2016 stating that the delivery terms were to be based on this newly issued invoice in 2017.

[48] On 3 April 2018, Stryker confirmed with the company that Swissray was not an authorised distributor of Novadaq products in any country. The company then stopped further payments.

[49] On 28 August 2018, Swissray insisted that the company continued to pay it for the two medical devices. The company maintained that it would not pay anything to Swissray in light of the termination of Swissray as Novadaq's distribut or.

[50] The company then highlighted that although UMMC remained an interested purchaser, there was still an issue regarding the pending registration of the devices, as documents were still required from Stryker.

[51] Swissray replied, stating that it would obtain the necessary documents from Stryker. It requested that the company obtain from UMMC an evaluation of the two medical devices and their willingness to purchase the devices. The company did so. However, the surgeons in UMMC also said

that Stryker had placed one of its own medical devices in UMMC, and maintained that it was the correct party for UMMC to engage with, in respect of any prospective sale. The company advised Swissray of this development and asked for a letter certifying that Swissray was the correct party to deal with in respect of the purchase of the two medical devices.

[52] On 7 December 2018, Swissray advised that it could not furnish the requested letter but that it was in the midst of handing over a letter to Stryker to receive some compensation. It suggested that the company maintain its relationship with Stryker.

[53] The company then sought assistance from Stryker to complete the sale with UMMC and sought to resolve the entire matter. This attempt did not succeed.

[54] On 24 December 2019, Swissray demanded payment for the total purchase price of the two demonstration units of medical devices. Swissray maintained that the total purchase price constituted a debt due and owing to them.

[55] The company by way of letter dated 14 January 2019 disputed the claim maintaining, *inter alia,* that:

(i) the two medical devices were not 'purchased' by the company;

(ii) the said devices were for promotional purposes for end clients;

(iii) the parties had agreed by conduct notwithstanding the terms of the distributorship agreement, and as evidenced by correspondence, that it was only in the event that UMMC placed a confirmed order that the said devices were effectively sold; and

(iv) the company put forward the proposal that both it and Swissray work together to sell the medical devices and alternatively proposed the return of the medical devices with its financial losses to be addressed.

The Grant Of The *Fortuna* Injunction In The High Court

[56] On 4 March 2022, Swissray served a statutory notice of demand on the company. The notice itself was dated 1 March 2022. The effect of the notice was that if the company failed to pay the sum required in the statutory notice, a winding-up petition would be filed. After a further exchange of correspondence, on 31 March 2022, the company filed an application to the High Court for a *Fortuna* injunction against Swissray to preclude them from initiating winding-up proceedings against the company. The High Court granted the *Fortuna* injunction sought, applying the lower threshold standard pronounced in *Salford*.

[57] The High Court granted a *Fortuna* injunction, applying the principles in set out in *Fortuna Holdings Pty Ltd v. The Deputy Commissioner Of Taxation Of The Commonwealth Of Australia* [1978] VR 83 namely that:

(i) where the presentation of a winding-up petition which has no chance of success as a matter of law and fact, might produce irreparable damage to the company, an injunction ought to be allowed; and

(ii) secondly, where a party presenting the winding-up petition chooses to do so, so as to assert a disputed claim which might produce irreparable damage to the company rather than by a suitable alternative procedure, an injunction ought to be allowed.

[58] These principles have been adopted in Malaysia in the cases of *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295; [2007] 3 MLJ 316 per Gopal Sri Ram JCA (later FCJ) and later in *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947; [2010] MLJU 2217 per Ramly Ali JCA (later FCJ).

[59] It is evident that in granting a *Fortuna* injunction, namely the prohibition of the presentation of a winding-up petition, the standard or threshold requirement is high, with the applicant needing to establish that the proposed winding-up petition has no chance of success, plus the requirement that its presentation would cause irreparable damage to a company. This is premised on the conventional principles of company law as enunciated, *inter alia,* in *Re A Company* [1894] 1 Ch 349; *Bryanstan Finance Ltd v. De Vries (No. 2)* [1976] 3 WLR 41; [1976] 1 All ER 25). The presentation of a winding-up petition is the right and entitlement of a creditor who brings the action not for himself or to determine the existence and quantum of a debt, but as a class action for the benefit of the class of unsecured creditors. As such it cannot be lightly precluded from doing so.

[60] It can be said that the grant of a *Fortuna* injunction and the grant of a stay or dismissal of a winding-up petition in the course of the hearing of a winding-up petition (see s. 492 of the CA) are premised on similar principles. The issue of whether a debt is disputed or undisputed sits at the heart of such determination, be it a *Fortuna* injunction or a stay, dismissal or grant of a winding-up petition. The threshold is the existence of a genuine debt which is disputed on substantial grounds.

[61] When determining this issue, the court is expected to undertake a review or consideration of the factual matrix comprising the basis for the existence of the 'debt'. In other words, it is not simply a question of reviewing and then relying on averments alone, but a requirement to be satisfied on a consideration of the salient facts, that the denial of the debt in terms of its existence and quantum is not a bare denial nor a frivolous attempt to ward off a clear liability incurred by the company.

[62] An undisputed debt and a valid judgment should preclude the issuance of such an injunction. If a debt cannot be disputed, then this cannot form the basis for the grant of a *Fortuna*, as the fact of irreparable damage becomes redundant. The winding-up petition should then proceed.

[63] This is because the winding-up petition is then properly brought by the creditor and cannot amount to an abuse of process warranting the grant of an injunction. In short, the *Fortuna* is issued to prevent an abuse of process.

[64] Of relevance to the instant appeal is the threshold test to be applied when determining such a matter. In issue is the standard of proof or standard of assessment to be applied by a court for the grant of a *Fortuna* injunction, when the proposed petition is premised on a 'debt' which is the subject matter of an arbitration clause/agreement? Is the threshold requirement that of a genuinely disputed debt on substantial grounds or is it sufficient that the debt is denied or disputed simpliciter, also commonly referred to as a '*prima facie* dispute'?

[65] In summary, the High Court speaking through Liza Chan Sow Keng J held that the court was inclined to follow the *Salford* approach of a *prima facie* dispute test. Her Ladyship held, *inter alia,* that the fact that the debt was not admitted was sufficient to constitute a dispute, irrespective of the substantive merits of any defence. As such, it was not incumbent upon the court to investigate whether or not the debt was *bona fide* disputed on substantial grounds. Instead, the parties should be held to their bargain to resolve their dispute by their chosen method of dispute resolution to arbitrate the matter.

[66] Also relying on *AnAn Group (Singapore) Pte Ltd v. VTB (Pubic Joint Stock Company)* [2020] SGCA ('*AnAn*'), the High Court concluded that the mere fact that there is a dispute as to the debt that fell within the scope of the arbitration agreement is sufficient cause for the *Fortuna* injunction to be granted for the purpose of compelling the parties to resolve their dispute *via* arbitration. This, it held was consonant with the Malaysian Court's policy underpinning minimum curial intervention when parties have chosen arbitration over litigation. The rationale that adopting the lower standard of review promotes coherence in the law in relation to stay applications, such that parties to an arbitration agreement are not encouraged to present a winding-up application as a tactic to pressure a debtor into paying up, as stated in *AnAn* was also adopted.

[67] Her Ladyship also relied on the Singaporean case of *BDG v. BDH* [2016] 5 SLR 977 ('*BDG*'), and rejected the Hong Kong decision in *Dayang (HK) Marine Shipping Co Limited v. Asia Master Logistics Limited* [2020] HKCFI ('*Dayang*') by Deputy High Court Judge William Wong SC. In the latter case, the learned judge held, *inter alia,* that as the companies court does

not resolve nor determine disputes when adjudicating on a winding-up petition. Its role is simply to determine whether the debt is in fact disputed on a genuine and substantial basis. As such it does not come within the scope of an agreement to arbitrate. The decision in *Dayang*, which contributed considerably to the decision in *Sian*, will be considered later in our analysis.

[68] The High Court therefore concluded that the *prima facie* threshold had been crossed applying the *Salford* test. Additionally, the court was satisfied that the company had not applied for the injunction in abuse of process. There was no evidence to suggest that it was motivated by any improper or collateral purpose. Significantly Her Ladyship concluded that even if the higher threshold test conventionally utilised in the companies court was applied, the case passed that threshold too. In so concluding, the court found that issues as to a variation of the terms of the distribution agreement and the possible existence of a genuine cross-claim for wrongful termination were genuine issues to be determined. This should be determined *via* arbitration proceedings. A *Fortuna* injunction was therefore granted.

The Decision Of The Court Of Appeal

[69] Swissray appealed against the grant of the *Fortuna* injunction. The Court of Appeal handed down its decision on the appeal some two weeks prior to the decision in *Sian* on 19 June 2024. The Court of Appeal chose not to follow the 'lower-threshold' test pronounced in *Salford*, maintaining that the higher threshold applied in winding-up proceedings, namely that the existence of a 'genuine or *bona fide* dispute' was the proper test to follow in deciding whether to allow, stay or dismiss a winding-up petition.

[70] In the course of its judgment, the Court of Appeal, speaking through Collin Lawrence Sequerah JCA, explored the developments in the United Kingdom, *ie*, *Salford* as well as the Singapore and Hong Kong case-law on the subject. His Lordship considered the argument that the court ought to refrain from conducting an inquiry in the nature of a summary judgment application in circumstances where a dispute arises between parties who have agreed to refer any dispute to arbitration. The failure to conduct a review to ascertain whether the debt was a genuine debt on substantial grounds or not, would amount to an 'abdication of their responsibility to determine whether the dispute raised is genuine or not. What then of a court's inherent jurisdiction to prevent abuse of a court process as articulated the *Fortuna* case and in *Tan Kok Tong* (*supra*).

[71] With respect to the Singaporean cases, the Court of Appeal stated that the legislative position in Singapore adopted a policy in preference of arbitration. As such, the lower threshold was adopted.

[72] However, it was noted that in Singapore the application of the *Salford* test was subject to the dispute not being raised as an abuse of the court's process. As such the party applying for the *Fortuna* had to show the existence

of a *bona fide* dispute and not merely a *prima facie* dispute even in the face of an arbitration clause. Accordingly, the Court of Appeal concluded that it is the *bona fide* test or that the debt is genuinely disputed on substantial terms that comprises the threshold test to be applied. To hold otherwise, it was stated would be to countenance a situation where frivolous disputes will be alleged just in order to stave off the presentation of a winding-up petition when in fact there is no genuine dispute to the debt.

[73] Reference was also made to the test adopted in *Megasteel Sdn Bhd v. Perwaja Steel Sdn Bhd* [2008] 4 CLJ 352 where Gopal Sri Ram JCA (as he then was) where it was held that a creditor need not have obtained a judgment in order to present a winding-up petition. If a petition could thus be presented on the strength of a debt alleged or asserted as owing to them without a judgment, it made no sense for the party applying to restrain or to stay a winding-up petition to merely assert that the debt is disputed on a lower threshold *prima facie* test without being able to withstand curial scrutiny of such assertion.

[74] The Court of Appeal went on to hold at para. [72] that "The mere assertion of the existence of an arbitration clause cannot simply be recited as if it is some mechanical mantra in order to evade what would otherwise be a legitimate claim to a debt due and owing." So, where the debt is unequivocally admitted, as was the Court of Appeal's view of the case before them, the court's hands ought not to be tied such that curial scrutiny was curtailed. As such the *Salford* test was rejected. The Court of Appeal on an appraisal of the merits of the case determined that there was no genuine dispute on substantial grounds and allowed Swissray's appeal. The result was that the *Fortuna* granted was set aside.

Proceedings In The Federal Court

[75] The company appealed to the Federal Court and posed the following questions of law:

> Question 1:
>
> Where a party to an arbitration agreement issues a notice under s. 466(1)(a), Companies Act 2016 against the other party in respect of a debt that is disputed, such dispute falling within the ambit of the said arbitration agreement, in seeking to restrain the filing or continuing of winding-up proceedings grounded on such notice, is the other party required:
>
> (i) to fulfil the "*bona fide* disput e on substantial grounds as to the debt" test applicable to *Fortuna* injunctions; or

(ii) to merely show that the debt is not admitted for such injunction to have been granted, having regard to the policy and spirit of the Arbitration Act 2005 that parties to an arbitration agreement are to be held to their said agreement that any dispute within its ambit is to be arbitrated.

Question 2

If this Honourable Court determines that the approach to be adopted is that proposed in 4.1(ii) above:

(i) is a High Court hearing such an application, or the Court of Appeal hearing an appeal from a decision of the High Court on such an application, to refrain from determining the genuineness of the dispute in line with the decisions of the English Court of Appeal in *Salford Estates (No 2) Ltd v. Altomart Ltd (No 2)* [2014] EWCA Civ 1575 and the Singapore High Court in *BDG v. BDH* [2016] 5 SLR 997; or

(ii) in the event winding-up proceedings have been commenced, and it is inappropriate for an injunction to be granted, is the winding-up court to similarly refrain from determining the genuineness of the dispute and, accordingly, stay or dismiss the winding-up petition in line with the decisions referred to above in 2.2(i), and further as per *AnAn Group (Singapore) Pte Ltd v. VTB Bank* [2020] SGCA 33;

Question 3

Further if this Honourable Court determines that the approach to be adopted is that proposed in 4.2 above and there is a foreign choice of law clause in the agreement, whether the courts are to refrain from determining the genuineness of the dispute given the arbitration clause.

[76] Leave was granted on 6 February 2024 for the questions above. Just before the first hearing date, the company applied to adduce fresh evidence, namely the evidence of Mr Thawichai who was Swissray's previous Sales and Marketing Director and had personally dealt with the company as Swissray's representative, particularly in relation to all crucial communications with the company, particularly the settlement negotiations. Mr Thawichai had left Swissray's employment sometime in 31 October 2018 and the company had only been able to locate and contact him after the hearing in the Court of Appeal.

[77] Mr Thawichai's evidence in essence supported the company's position that the sale and purchase of the two medical devices would only materialise on payment and confirmation of the sale by an end-user or potential client as well as the registration of the two medical devices under relevant Malaysian legislation. As such, there was no confirmed order for the sale of

the two medical devices to the company and the documents had to be read in that light. The payments made by the company were essentially an agreed deposit and payments suggested by Mr Thawichai himself due to pressure from Swissray's finance department.

[78] We applied r. 7(3A) of the Rules of the Court of Appeal 1994 *vide* r. 3 of the Rules of the Federal Court 1995), which encapsulates the test in *Ladd v. Marshall* 3 All ER 745 namely that, the criteria for the fresh evidence to be admitted is that the fresh evidence:

(i) could not have been located or obtained with reasonable diligence prior to the hearing of the appeal;

(ii) is genuine or authentic and not patently unbelievable or doubtful; and

(iii) was likely to be of determinative influence in the appeal.

[79] We allowed Mr Thawichai's affidavit to be admitted and read as evidence in the appeal. We accepted that this evidence could not have been procured earlier as the company had to expend time to locate and obtain Mr Thawichai's acquiescence to giving the evidence, as he had previously been in the employ of Swissray. His evidence as the previous General Sales Manager of Swissray who had dealt closely with the company, could not be dismissed out of hand as being an obvious or clear falsehood or untruth. This would require further investigation.

[80] Finally, for the purposes of the grant of a *Fortuna* injunction it was likely that his evidence, given its nature, would have a determinative effect on the appeal.

[81] Having considered the matter in full, namely the appeal records, the submissions of the parties both written and oral, we were of the unanimous view that the appeal should be allowed. We found that there was a genuine dispute on substantial grounds that had to be explored. Accordingly, we reinstated the *Fortuna* injunction granted by the High Court.

[82] However, the crux of the appeal turned on the relevant threshold test to be applied by the courts in Malaysia in determining whether to stay, dismiss or allow a winding-up petition or in the grant an injunction restraining the presentation of a petition, where the dispute relating to the debt underlying the petition is the subject to an arbitration agreement.

[83] Initially, learned counsel for the company contended before us that the *Salford* test was the correct one, while learned counsel for Swissray submitted that the correct test was that articulated in *Sian*. During the course of oral submissions however, learned counsel for the company conceded that the correct test was that in *Sian*.

[84] We decided in favour of the test in *Sian*, namely that in a winding-up petition where the debt is disputed and is subject to an arbitration clause, the correct test to be applied is for the court to ascertain in the exercise of its discretionary powers under the CA whether the debt is a genuine debt premised on substantial grounds or whether it is simply an abuse of process calculated to derail or stifle the arbitration process that the parties had agreed to abide by at the onset of their relationship.

[85] Before we go on to set out our analysis giving rise to the decision we consider in summary the position in some of the other Commonwealth jurisdictions.

The Malaysian Position – Pre And Post Sian

Pre-Sian

[86] In the High Court decisions of *Awangsa Bina Sdn Bhd v. Mayland Avenue Sdn Bhd* [2019] CLJU 590; [2019] 1 LNS [2019] MLJU 1365 and *V Medical Services M Sdn Bhd v. Swissray Asia Healthcare Co Ltd* [2022] 10 CLJ 313; [2023] 7 MLJ 155, the present appeal at the High Court level, (which we discussed at length earlier) the courts adopted the reasoning in *Salford* and followed it.

[87] In *NFC Labuan Shipleasing Ltd v. Semua Chemical Shipping Sdn Bhd* [2017] CLJU 943; [2017] 1 LNS 943; [2017] MLJU 900 Mohd Nazlan Mohd Ghazali J (now JCA) did not follow *Salford*. In adjudicating on a winding-up petition premised on a debt which arose from a dispute which was the subject matter of arbitration, His Lordship found firstly that as the party seeking the stay had 'taken a step in the proceedings' it was no longer open to it to obtain a stay of the proceedings. For completeness, His Lordship set out an additional and alternative approach which as he put it, i s the more fundamental objection as to why the stay application filed by the respondent could not succeed:

> [32] … Winding-up proceeding is plainly a class of its own. It is *sui generis*. It is primarily regulated by the provisions of the law enacted specifically to govern such proceedings.

[88] At para. [34] of the judgment the collective nature of the winding-up process and its purpose was emphasised. Winding-up was activated for the benefit of not just the petitioner but instead the general body of unsecured creditors, all on a *pari passu* basis. In that sense it was not a claim for payment. It is a class action in the public interest which brings into operation the statutory regime for realising and distributing the assets of a company for the benef it of its creditors. That, it was pointed out is manifestly not the objective of having the alleged dispute referred to arbitration.

[89] At para. [35] His Lordship concluded that a stay application of a winding-up petition pending arbitration could be viewed to be of doubtful relevance and validity. A winding-up petition is not therefore in the nature of a substantive claim contemplated under s. 10 of the AA. And at para. [46] it was emphasised that fundamentally, a petition is premised on the inability of the debtor to pay the debt to the creditor, and not to determine whether the defendant in the winding-up petition was legally indebted to the petitioner. Therefore, a stay of the winding-up petition by referring the matter to arbitration "… is entirely incongruent with the true essence of a winding-up petition."

[90] And at para. [53] the conclusion was that winding-up proceedings are not a form of 'proceeding' nor a 'matter' within the ambit of s. 10 of the AA. A petition is a statutory right that may be invoked and exercised at any time in accordance with the law on winding-up. This statutory right cannot be modified or diluted by s. 10 of the AA.

[91] The court also addressed *Salford* but concluded that nonetheless there was no impediment to allow the winding-up court to proceed to hear the petition and decide to dismiss the same or even stay the same as the justice of the case demanded. But the court shut the door against the proposition that the law sanctions an automatic and mandatory stay of a winding-up petition for reference to arbitration under s. 10 of the AA. The stay was accordingly refused. In this case the importance of winding-up was emphasised and the higher threshold test was adopted on a reasoned basis.

Swissray – Court Of Appeal

[92] Similarly, the Court of Appeal in the instant matter also rejected the approach in *Salford* and applied the higher threshold test that has conventionally been used in the companies court in this jurisdiction, providing reasons, as we set out earlier in this judgment.

Post-Sian

[93] In a recent decision handed down by the High Court in *Konsortium Express Sdn Bhd v. Embition Sdn Bhd* [2025] MLJU 199 Suhendran JC in a meticulous yet succinct judgment decided that the threshold test to be adopted was that in *Sian*. Reviewing the decisions in *Salford* and *Sian*, it was concluded that the latter provided the preferred rationale and therefore the test to be adopted. The clear delineation between the winding-up process and liquidation was examined as was the legislative intent behind the arbitration and insolvency regime. Suhendran JC held as follows:

> I cannot see how the policy of arbitration to hold contracting parties to their agreement to arbitrate, trumps the policy behind the winding-up legislation, which exists for the benefit of an entire class of persons who may be substantial in number.

[94] His Lordship went on to hold that it was important to examine the policy aims of the insolvency regime against the arbitration regime before deciding which regime should "trump the other". It was not tenable to ignore the policy behind the winding-up provisions and reasoning which ascribed to this was unsafe. Accordingly, the learned JC concluded that the legislative policy favouring arbitration did not override legitimate winding-up proceedings in all circumstances.

Singapore

[95] The courts in Singapore have adopted the lower threshold test of a *prima facie* standard of review, along the lines of *Salford*. This is borne out by the cases of *BDG v. BDH* [2016] 5 SLR 977 ('*BDG*'), *BWF v. BWG* [2019] SVHC 81 (both decisions of the High Court) and *AnAn Group (Singapore) Pte Ltd v. VTB Bank (Public Joint Stock Company)* [2020] SGCA 33 (*'AnAn'*) (Singapore Court of Appeal).

[96] Earlier in 2011, in *Larsen Oil And Gas Pte Ltd v. Petropod Ltd (In Liquidation) And In Compulsory Liquidation In Singapore* [2011] SGCA 21 ('*Larsen*') the Singapore Court of Appeal considered whether Petropod's, claims against Larsen fell within the scope of the arbitration clause and whether the court's discretion was dependent on the arbitrability of the dispute and whether its claims against Larsen were arbitrable. While not on all fours with the issue before us, as the creditor company was in liquidation and as the primary issue related to arbitrability, it is relevant in that it underscores the rationale underlying the treatment of arbitration clauses in an insolvency regime.

> [1] Arbitration and insolvency processes embody, to an extent, contrasting legal policies. On the one hand, the arbitration embodies the principles of party autonomy and decentralisation of private dispute resolution. On the other hand, the insolvency process is a collective statutory proceeding that involves the public centralisation of disputes so as to achieve economic efficiency and optimal returns for creditors. The appeal before us raised an interesting and novel point of law relating to the interfacing these two policies where private proceedings could have wider public consequences. To what extent ought claims involving an insolvent company be permitted to be resolved through the arbitral process? ...

[97] At para. 45 of the judgment the Singapore Court of Appeal drew a distinction between "disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and those that arise only upon the onset of the insolvency regime.

> [46] We, therefore are of the opinion that the insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard. The courts should treat disputes arising from the

operation of the statutory provisions of the insolvency regime *per se* as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement.

[47] On the other hand, different considerations apply in relation to disputes involving an insolvent company that stem from its pre-insolvency rights and obligations. These disputes are binding on liquidators who, although not parties to such agreements, have stepped into the shoes of the company liquidation. *Such disputes differ from those arising on the onset of insolvency because they do not involve public policy considerations such as the protection of creditors. Nonetheless, there are other policy issues that may militate against giving effect to them.* (emphasis added)

[98] Those other policy issues which are outlined in para. 48 include ensuring parties' fundamental rights of access to the courts, which might be lost if parties are compelled to arbitrate. Secondly, the recognition that the creditors of the insolvent company are the parties with the real interest in any dispute that involves the insolvent company, since they are the ones who stand to lose or gain from any diminution or augmentation of the company's assets. As these creditors are non-parties to the arbitration agreement between the liquidator and the arbitral counterparty, it was difficult to justify why the liquidator should be compelled to give up its rights to judicial remedies in favour of arbitration. In short, the Singapore Court of Appeal recognised that disputes arising at the onset of insolvency required the court to take into consideration the interests and protection of creditors by way of public policy.

[99] In *AnAn*, which was a subsequent decision of the Singapore Court of Appeal in 2020, reference was made to *Larsen* and it was recognised that arbitration and insolvency processes appeared to embody contrasting policies per *Larsen*. However, reference was made to the distinct ion drawn in *Larsen*, between disputes that arise upon the onset of insolvency and pre-insolvency rights and obligations. In the case of the former, it was concluded that as the collective enforcement procedure came into play, it was in the wider public interest that disputes arising from the statutory provisions of the insolvency regime be regarded as non-arbitrable.

[100] Whereas in the latter case, it was held that disputes arising from pre-insolvency rights and obligations do not involve public policy considerations such as the protection of creditors. It was concluded that in such pre-insolvency disputes, the policy concerns of the insolvency regime are not strictly engaged, as a winding-up petition premised on a failure to comply with a statutory demand, results in a presumption of insolvency but does not determine this as a matter of fact. The arbitration of the dispute is a necessary pre-condition to bringing the insolvency regime into the equation. As such, there was no conflict in the two regimes.

[101] It was therefore held that when a court is faced with either a disputed debt or a cross-claim that is subject to an arbitration agreement, the *prima facie* standard applies, such that the winding-up proceedings will be stayed or dismissed so long as; (a) there is a valid arbitration agreement between the parties; and (b) the dispute falls within the scope of the arbitration agreement, provided that the dispute is not being raised by the debtor in abuse of the court's process. The reasons for adopting this standard are to achieve coherence in the law in relation to stay applications so that winding-up proceedings cannot be used as a tactic to pressure a debtor to make payment on a disputed debt. This would be an abuse of the winding-up proceedings.

[102] It was also held that applying the higher threshold of proof which is termed the 'triable issue' standard, offends the principle of party autonomy which is the cornerstone underlying judicial non-intervention in arbitration.

[103] The approach adopted in Singapore emphasises the importance of ensuring compliance with the arbitration agreement and thus the arbitration regime.

[104] In *BDG v. BDH* [2016] 5 SLR 977 ('*BDG*') , the Singapore High Court accepted that the approach in *Salford* was to be followed in determining the correct test to be applied. The rationale in *BDG* is that:

(i) while the objective of the higher threshold was effective to ensure that winding-up was not avoided or precluded on flimsy grounds, such objective became less pressing and dominant in the face of an arbitration clause;

(ii) the countervailing objective was to hold parties to their agreement to arbitrate and the court ought not to step in. As such, it was justifiable for different considerations and the adoption of a different standard to be applied;

(iii) adopting this lower standard would not frustrate the winding-up regime by allowing companies desperate to fend off their creditors to rely on a lower threshold to ward off the winding-up of the company. This is because if the issues raised are not *bona fide* then there is no *prima facie* dispute;

(iv) further, any apparent injustice suffered by the creditors should be assessed in the context of the bargain struck between these creditors and the company. Arbitration would have been contemplated as being part of the process from the moment the parties signed off on the agreement. Nothing inequitable or unfair would result from the parties being made to go through arbitration before they invoke the winding-up process. If an arbitration clause was included, there is no real injustice: *pacta sunt servanda.*

[105] An approach similar to that in *BDG* was adopted in *WBF v. BWG* [2019] SGHC 81 namely that of a *prima facie* standard of review but with an abuse of process control, meaning that if the debt was not in dispute it would afford no grounds for a stay, dismissal or restraining of the petition.

[106] In these cases, it appears that the arbitration regime is accorded greater weight in the equilibrium that subsists between the disparate fields of arbitration and insolvency.

[107] The position taken is, as per *Salford*, that the principles applicable to applications for a mandatory stay in arbitration legislation are applicable when a court is exercising its discretion in relation to winding-up petitions, where the disputed debt is the subject matter of an arbitration agreement. This position is adopted to achieve legal coherence. In the context of legal coherence the position taken appears to be that there should be no difference between the test for the grant of a stay of proceedings, whether commenced in court, or a where a winding-up petition is initiated by a creditor whose debt is premised on a dispute subject to an arbitration clause, thereby justifying the single lower threshold test.

Post-Sian – Singapore

[108] In the Singapore High Court case of *Sapura Fabrication Sdn Bhd ('Sapura') & 3 others v. GAS* ('*GAS*') [2024] SGHC 241, the decision in *Sian* was considered. Sapura had been undertaking restructuring efforts in the courts in Malaysia since 2022 *via* a series of applications for schemes of arrangement. The proceedings before the Singapore Court related to the third reorganisation proceedings. GAS (a non-party to the reorganisation proceeding) and Sapura's dispute which related to the provision of construction related services in relation to oil and gas facilities operated by GAS, for some US$169 million, contained an arbitration agreement. Arbitration proceedings were commenced at the behest of GAS. In the application before the Singapore High Court GAS sought a carve-out (under art. 20(6) of the UNCITRAL Model Law on Insolvency ('Model Law') from the automatic stay arising under art. 20(1) of the Model Law for arbitration to proceed. The carve-out was granted, meaning that the arbitration between GAS and Sapura was allowed to proceed on condition that no enforcement of the arbitral award so obtained, was to be taken by GAS, whether in Singapore or otherwise.

[109] In so determining, the issue of whether, in the course of Sapura's restructuring proceedings aimed at rehabilitation, arbitration proceedings brought by GAS:

(i) ought to be stayed pending such reorganisation; or

(ii) carved out and allowed to proceed.

came to the fore.

[110] Of relevance for present purposes is the position taken in respect of *Sian*. It was held that *AnAn* and the case of *Founder Group (Hong Kong) Ltd (In Liquidation) v. Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 were binding on the High Court. As such, the applicable position in law was that an insolvency court would generally stay or dismiss a winding-up petition based on a disputed debt if it is satisfied on a *prima facie* test (the lower threshold test) that there is a valid arbitration agreement and the dispute falls within its scope.

[111] Further, *Sian* was held to be distinguishable on the grounds that the reasoning there, namely that when exercising its discretion on a winding-up petition, the companies court does not adjudicate on the resolution of the debt, in terms of liability or quantum, did not apply to a scheme of arrangement because the purpose of the latter was to achieve a complete resolution of the scheme company's liabilities. To that extent it could not be said that there was no final resolution of the debt comprising the subject matter of the arbitration agreement.

[112] The importance of international arbitration agreements was emphasised, pointing out that international arbitration agreements are *sui generis* in terms of the strictness of their enforcement as compared to jurisdiction clauses and domestic arbitration agreements. The court also pointed to countervailing factors as set out in art. 20(1) of the Model Law on Cross-Border Insolvency which establishes a mandatory limitation to the effectiveness of an arbitration agreement.

[113] It may be gleaned that greater weight is accorded, particularly in international arbitration, to enforce the obligation to adhere to the contractual rights binding the parties to arbitrate, as compared to the interests of rehabilitation in a pre-insolvency setting. Less weight is accorded to:

(i) the interests of the body of creditors who are willing to compromise their claims in order to ensure a *pari passu* distribution of the remaining assets; and

(ii) ensuring that the remaining assets of the debtor company are not depleted on one creditor to the detriment of the body of creditors and the debtor company, who are working towards rehabilitating the company to avoid insolvency, and therefore compromising their claims.

[114] Such compromise is not equivalent to the adjudication of a claim on its merits.

[115] The position therefore is that the courts in Singapore apply the lower threshold test.

Hong Kong

[116] In Hong Kong, the courts have taken a more divergent approach. In *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449 (*Lasmos*) Harris J held (at para. 31) that if a company disputes the debt relied upon by the petitioner and the contract under which the debt is alleged to arise contains an arbitration clause that covers the dispute relating to the debt, and the company takes the steps required under the arbitral process, then the petition should be dismissed. It essentially follows *Salford* in applying the lower-threshold test, with the additional condition that the debtor company takes the steps required under the arbitration clause to commence the dispute resolution process. It is therefore sufficient for the debtor company to deny the existence of the debt, without having to comply with the conventional threshold of a genuine dispute on substantial grounds.

[117] In *But Ka Chon v. Interactive Brokers LLC* [2019] HKCA 873, the Hong Kong Court of Appeal expressed reservations about this approach. The reservation related to the curtailing of the rights of a creditor to present a petition and questioned whether the court, in a situation where there is no substantial dispute should nonetheless stay or dismiss the petition.

[118] In *Dayang*, Deputy High Court Judge William Wong SC explained the underlying rationale which warranted the retention of the test conventionally utilised in liquidation, and was therefore the higher threshold test. At para. [71]:

> … In my view the correct question to ask is whether the presentation of a winding-up petition *per se* would amount to a breach of an agreement to resolve disputes by way of arbitration. Put another way: does the presentation of a petition for winding-up entail a submission of a dispute for the determination and/or resolution by the Companies Courts?
>
> The short answer, in my respectful opinion, is unequivocally "no". The Companies Court neither resolves not determines disputes when ruling on a creditor-petitioner's locus to wind-up a debtor-company. Instead, disputes over the debt are only finally resolved upon determination by the liquidator (subject to the possibility of appeal). Given that a creditor-petitioner is only obliged by an agreement to arbitrate to submit to arbitration for resolution or determination, the presentation of a winding-up petition does not come within the scope of an agreement to arbitrate.

[119] Emphasising that the companies court does not determine the dispute comprising the subject matter of arbitration, but only ascertains whether the debt in respect of which an arbitral clause or agreement subsists is genuinely disputed on substantial grounds, a fundamental distinction was drawn between the two differing proceedings. This point is the determinative point of law in relation to the correct test to apply as the threshold test, and was acknowledged and applied by the Privy Council in *Sian*. While the judgment goes on to elucidate the matter in considerable detail, it is sufficient for the present appeal to hone in on this issue.

A **British Virgin Islands ('BVI')**

[120] In the BVI, the applicable test to determine when the presentation of a winding-up petition ought to be precluded where an arbitration clause governs the resolution of the dispute is set out in *Jinpeng Group Ltd v. Peak Hotels and Resorts Ltd* BVIHCMAP2014/0025 (8 December 2015) ("*Jinpeng*").

B

[121] In brief, *Jinpeng* reaffirms the orthodox test generally applicable in assessing whether a creditor should be permitted to apply for the appointment of a liquidator over a debtor company – namely, that a liquidator should ordinarily be appointed on the application of a creditor unless there is a genuine dispute about the debt on substantial grounds. The court in *Jinpeng* therefore held that while a dispute existed and was covered by an arbitration clause, on the facts of that case, it did not rise to the level of a genuine dispute on substantial grounds.

C

D **[122]** Additionally, *Jinpeng* clarified that a creditor's application for liquidation does not fall within s. 18 of the Arbitration Act (our s. 10 of the AA) and is therefore not subject to a mandatory stay. Webster JA (Ag) emphasised that while arbitration agreements may lead to a stay, a creditor does not need to prove exceptional circumstances to apply for liquidation under s. 162(1)(b) of the BVI Insolvency Act .

E

[123] It is worth noting that a lower court in *Rangercroft Ltd v. Lenox International Holdings Ltd* (BVIHC (Com) 2015/0089) distinguished *Jinpeng* and applied a lower threshold for providing a stay.

[124] Having considered the position in several jurisdictions we turn to our analysis of the issue.

F

Our Analysis

[125] The issue as specified at the outset of this judgment is this:

> What is the test a Court should adopt when a defendant in a winding-up petition, disputes the existence of the debt which comprises the basis for the winding-up petition, but the dispute relating to such debt falls within the scope of an arbitration agreement?

G

[126] It is worth noting that in the instant case, we are dealing with a Malaysian and a foreign entity and the arbitration therefore falls within the purview of foreign arbitration proceedings. The choice of law is Swiss and the seat of arbitration is Zurich, Switzerland. The company is not and was not sought to be wound up under domestic or foreign insolvency legislation, prior to the present winding-up proceedings. The winding-up proceedings are brought up by the party which is also party to the arbitration agreement. The arbitration agreement remains valid and binding, and is not affected by the initiation of the winding-up proceedings *per se*. The issue therefore remains

H

I

the same, namely whether the subsistence of the arbitration agreement has the effect of lowering the threshold applied by the companies court conventionally in relation to curial scrutiny in determining whether the debt is disputed or not.

[127] Of relevance too is the fact that no steps to initiate the foreign arbitration proceedings have been made by either the company or Swissray.

[128] We are cognisant of the reality that in an international arbitration, because arbitrators are not attached to any forum, all national laws including mandatory national insolvency may be considered to be foreign to them. However, to ensure enforceability it is necessary for arbitrators to respect the mandatory laws of the seat of arbitration including the situation where one of the parties is insolvent or about to be declared to be insolvent. Failure to consider mandatory insolvency laws may result in a refusal to accord recognition and enforcement either on the grounds of non-arbitrability or as contravening the public policy of the state. In short, insolvency laws ought to be recognised and given effect in the context of international arbitral proceedings. The fact of insolvency *per se* does not necessarily frustrate the parties' agreement to arbitrate. Modifications may be made to ensure that the fundamental purpose of insolvency, namely the interests of other unsecured creditors is neither ignored nor defeated in the course of enforcing the agreement to arbitrate.

[129] In the present proceedings therefore, the fact that this is an international arbitration agreement does not alter the fact that in winding-up proceedings the company's discretion to decide whether to allow, stay, restrain or dismiss the petition is not influenced nor governed by the legislative intent of the AA.

The Correct Threshold Test

[130] The starting point of our analysis is to give consideration to the legislation in relation to both arbitration and insolvency respectively in this jurisdiction in terms of the purpose, object and policy of the respective statutes, namely the AA and the CA.

The Arbitration Act 2005

[131] The short title of the AA states that it serves to reform the law relating to domestic arbitration, international arbitration, the recognition and enforcement of awards and for related matters. The Act is modelled on the UNCITRAL Model Law. It is a comprehensive and composite statute dealing wholly with the issue of arbitration, both domestic and foreign. The policy underlying the legislation is to ensure and facilitate arbitration agreements where the parties to the agreement have agreed that a dispute arising from their relationship is to be determined by arbitration. As stated in *Redfern* and *Hunter*[1], it is an effective way of obtaining a final and binding decision on a dispute or series of disputes without reference to a court of law.

[132] In this context, it enforces a private, voluntary and consensual agreement between only the parties to the agreement. The legislation in this area serves to regulate the system of private justice both domestically and internationally. From an international perspective, arbitration is supported by international treaties and conventions which seek to link national laws together to weave a system of worldwide enforcement of both the arbitration agreements as well as enforcement of awards. These include the New York Convention of 1958, the UNCITRAL Arbitration Rules, and the UNCITRAL Model Law together with its revisions which forms the 'boiler-plate' so to speak for arbitration in much of the common law world, at least.

[133] What is key to the arbitration legislation in our jurisdiction which mirrors the Model Law is that it envisages and deals with arbitration as taking place only between the parties who are party to the arbitration agreement. Enforcement of an arbitration agreement is similarly sought to ensure that parties comply or abide with their obligations under such agreement. To that end an international arbitration agreement is to be enforced on an international basis and not simply where the agreement was made. This may well explain the need to defer to arbitration, particularly on an international level, namely to ensure that parties comply with their obligations, contracted internationally and beyond their domestic borders.

[134] It should also be pointed out that a core feature of arbitration, whether domestic or international, as we understand it, neither envisages nor admits of its enforcement being effected such that it impinges or encroaches upon other third party rights, outside of the arbitration agreement. The legislative intent therefore is to enforce compliance by the parties to the arbitration agreement both domestically and internationally but does not extend beyond that. For example, the Act does not, by its provisions, purport to expand its reach to parties or matters outside of the arbitration agreement and proceedings commenced under such agreement. This is borne out by the definition of 'party' under the Act in s. 2.[2]

[135] In like manner, the Act does not purport to extend its application to other areas of the law such as insolvency, or admiralty for that matter.

The Winding-Up Provisions In The Companies Act 2016

[136] The law relating to winding-up which is categorised under insolvency law in the CA deals primarily with creditors of a debtor company that are not getting paid monies which they are legally owed. It pertains to situations where a company is not meeting its financial commitments. However, as has been pointed out in nearly all the judgments on this subject, a winding-up proceeding is in substance a collective proceeding which, although initiated by a single creditor, is ultimately for the benefit of the body of unsecured

creditors. Each creditor forgoes his right to enforce the debt owed to him and instead accepts the result of the collective proceedings which entitles the body of creditors to recover to different degrees.

[137] Public interest comes into play in the process because[3]:

(i) it is in the public interest that the body of unsecured creditors debts are dealt with in an orderly and expeditious way. These creditors are the primary beneficiary of the proceedings initiated by the creditor presenting the winding-up petition;

(ii) the institution of winding-up proceedings is a collective procedure to ensure that the distribution of assets to the creditors is on a *pari passu* basis rather than a 'first come first served' disorderly fight to the finish;

(iii) collectivism is preferred as a resolution as it ensures that not only one or two creditors receive full payment at the expense of others, who receive little or nothing; and

(iv) it is in the public interest that people are protected from the adverse effects which insolvency can produce.

[138] The point sought to be made from the exposition on the completely different fields of arbitration and insolvency law is that the object, purpose and legislative intent underlying these two statutes are entirely dissimilar. Each statute is distinct and discrete. As stated in *Sian*, it would not have been conceived that they would ever collide/clash, but the reality is that creditors who have entered into arbitration agreements may find themselves in a position where the opposing party, the debtor, is either genuinely insolvent, or that the creditor seeks to use the winding-up procedure to enforce his claim expeditiously by circumventing the arbitration process. This latter application of the winding-up process is clearly not the function for which the collective procedure was designed, and in so using the procedure, the creditor is effectively abusing the winding-up process for a collateral purpose, unless the debt is unequivocally due and owing. Where there is a disputed debt, the winding-up petition, as is the custom of the companies court, is stayed or dismissed. The creditor who sought to utilise this mode of enforcement is penalised in costs.

[139] Therefore, the legislative intent or policy behind the two statutes is entirely disparate. As such, it should follow that the legislative intent underlying the AA should not be applied to the winding-up provisions in the CA. Nor should the legislative intent of the latter be imported or applied in relation to the AA. There is no basis to warrant such utilisation or employ of the legislative intent of one in respect of the other.

[140] Neither ought the provisions of either Act be engaged in the course of construing the other.

[141] Once this is accepted it follows that each Act should be construed within its own context and in line with its unique legislative intent (see s. 17A of the Interpretation Acts 1948 and 1976). The purposive approach statutorily required there does not envisage the importation of either the provisions or legislative intent of unrelated statutes.

Do The Stay Provisions In Section 10 Of The AA (Or Article 8 Of The Model Law) Apply In The Winding-Up Process?

[142] The second point to be made relates to the stay provisions under the AA. Section 10(1) of the Act which mirrors art. 8 of the Model Law provides:

> A court before which proceedings are brought **in respect of a matter which is the subject of an arbitration agreement** shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[143] The key words are "… in respect of a matter which is the subject matter of an arbitration agreement …"

[144] When a winding-up petition is brought in the companies court, premised on the ground that the debtor is deemed insolvent under the CA for failing to meet a statutory demand[4], is the companies court adjudicating on a matter which is the subject of the arbitration agreement?

[145] The answer is no.

[146] The companies court is determining whether or not the debtor is insolvent so as to put into effect the collective and cooperative system pursuant to which there can be an orderly distribution of the assets to the creditors according to their entitlement on a *pari passu* basis. The companies court is not adjudicating on the dispute that comprises the subject matter of the arbitration agreement.

[147] As the companies court is not adjudicating on the "matter" which comprises the subject matter of the arbitration agreement, but is examining and determining a different issue, namely whether the defendant company is insolvent or not, it is not justifiable to import either the statutory provisions or the legislative intent of the AA into the statutory provisions regulating winding-up petitions under the CA.

[148] As stated at the outset of this analysis, where the two acts are composite and distinct, they ought to be construed and applied within their respective contexts. It is also conventionally acknowledged and established that the importation of statutory provisions from one statute unrelated to, or distinct from another, is not tenable.

[149] Save for specific situations, an Act is meant to be construed in light of its own terms and not by the terms of another statute. This rule of course does not affect reference to the legislative history of a provision or Act, which is not in issue in the present case. See *Brown v. Bennett (No 2)* [2002] 1 WLR 713 (Ch), Neuberger J at [40]:

> 40. By the same token, an exercise involving a comparison of section 51 with the provisions of certain sections of the 1990 Act, in order to assist in identifying the extent and effect of section 51, appears to me to be illegitimate. **In the absence of special circumstances, one cannot normally construe a provision of one Act, such as the 1981 Act, by reference to the provisions of another Act, in this case the 1990 Act.**
>
> (emphasis added)

[150] It follows therefore that where statutory provisions are not to be applied interchangeably in separate and distinct statutes, then legislative intent too cannot be incorporated from one statute to another.

[151] In *Salford*, the English Court of Appeal accepted that the winding-up petition was not a claim for payment of the debt which formed the basis for the petition. It also refused to accept that Parliament intended *vide* s. 9 of the English Arbitration Act 1996 (which is the mandatory stay provision equivalent to art. 8 of the Model Law) "… to confer on a debtor the right to a non-discretionary order striking at the heart of the jurisdiction and discretionary power of the court to wind up companies in the public interest where companies are not able to pay their debts." (para 35).

[152] And at (para. 38), the court went on to state categorically that an alleged due but unpaid debt which is essential to the foundation of the petition is not a claim which falls within s. 9 of the English Arbitration Act 1996. The section, it was held, had no application to the petition.

[153] This conclusion is consonant with the divergent object, purpose and therefore legislative intent of the two acts relating to arbitration and insolvency.

[154] However, the English Court of Appeal went on to state that the matter did not end there. Invoking s. 122(1) of the English Insolvency Act 1986 which deals with the companies court's discretionary power to wind up a company, it went on to state that the companies court should save in wholly exceptional circumstances exercise its discretion consistently with the legislative policy embodied in the English Arbitration Act 1996.

[155] The net result of the decision is that while the provisions of the two Acts are separate and distinct such that provisions from one cannot be imported into the other, the legislative intent of the arbitration legislation had to be followed, save in wholly exceptional circumstances so as to stay or dismiss the petition. In effect therefore, there was an importation of the legislative intent from the arbitration statute to the insolvency statute in relation to winding-up proceedings.

[156] The rationale for this result is found in para. 40 of the judgment which states that the intention of the legislature in enacting the arbitration legislation was to exclude the court's jurisdiction to give summary judgment, unlike the predecessor Act. It would be "anomalous" for the companies court to conduct a summary judgment type analysis of liability for an unadmitted debt on which the winding-up is grounded when the creditor has agreed to refer any dispute relating to the debt to arbitration. Therefore, the discretion to allow, stay or dismiss a winding-up petition under the English Insolvency Act had to be undertaken consistently with the policy under the English Arbitration Act 1996 such that the petition had to be stayed or dismissed. Otherwise, it would be left open to one of the parties to apply pressure on the alleged debtor to pay up immediately or face the burden to apply for a petition to restrain presentation or advertisement of a winding-up petition and satisfy the court that the debt is genuinely disputed on substantial grounds. That would be contrary to the parties' agreement as to the proper forum for the resolution of the issue and to the legislative policy of the English Arbitration Act 1996.

[157] In June 2024, the Privy Council in *Sian* at para. [88] held that "*Salford Estates* and the cases which have followed it were wrong to introduce a discretionary stay of creditors' petitions where an insubstantial dispute about the creditor's debt is raised between parties to an arbitration agreement." The Privy Council also issued a *Willers v. Joyce* direction that its decision in so far as it held that *Salford* was wrongly decided now represents the law of England and Wales.

[158] The Privy Council held that the correct test to apply when a winding-up petition premised on a disputed debt which is also the subject matter of an arbitration agreement is presented before the companies court is 'whether the debt is disputed on genuine and substantial grounds'.

[159] In its reasoning, *Sian* held that a creditor's winding-up petition does not trigger the mandatory stay provided for under the arbitration legislation. This is because firstly, the stay provisions did not extend to winding-up proceedings. Secondly, a winding-up petition is not a claim of the type caught by those provisions. The petition does not seek to resolve nor determine the petitioner's claim to be owed money by the company. In short, the existence or otherwise of the debt underpinning the petition did not fall for determination in such winding-up proceedings.

[160] The Privy Council went on to explain that arbitration proceedings would not be adversely affected because their primary aim is to refer disputes to arbitration for resolution. The negative obligation is not to have such disputes determined by any court process. The presentation of a winding-up petition does not however offend that negative obligation in any way.

[161] The underlying policies of arbitration legislation based on the Model Law were equally not of fended or infringed by a party to an arbitration agreement seeking liquidation of a debtor party which fails to pay its debt. The use of insolvency legislation is prohibited where a debt is genuinely disputed on substantial grounds as the policy is that the creditor should prove his claim by having the dispute resolved in his favour either by judgment or an arbitral award. The principles of party autonomy and *pact sunt servanda* were also not offended for these reasons.

The Preferred Test

[162] As we stated at the outset, we decided to follow the decision in *Sian* as its approach appeared to clarify the law while giving independent consideration to both arbitration and insolvency. Significantly the adoption of the conventionally utilised test in insolvency proceedings, namely that it is only upon establishing that a debt is genuinely disputed on substantial grounds that a winding-up petition will be stayed, even where there is an arbitration agreement, appears to give effect to the purpose and object of the insolvency provisions under the CA. It also does not offend the grant of a mandatory stay to ensure that parties do not seek to resile from their obligation to arbitrate pursuant to an arbitration agreement. We so conclude because:

(i) the AA does not purport to extend its reach to the insolvency provisions under the CA. Its provisions ought not to be invoked or incorporated into the exercise of discretion by the companies court in determining whether to grant a *Fortuna* injunction, or stay, dismiss or allow a winding-up petition. Any such step would be contrary to the purpose and object of the respective statutes. It follows that the legislative intent of the AA, in like manner, cannot be extended from, or incorporated into, the CA. In short, neither the mandatory stay provisions in s. 10 of the AA nor the legislative intent underlying the AA may be invoked in the companies court when the latter is determining whether to allow, stay, restrain or dismiss a winding-up petition;

(ii) if, in the course of exercising its discretion to stay, restrain, dismiss or allow a petition under s. 465 of the CA, the court is expected to give effect to the legislative intent in s. 10 of the AA, this in effect means that where there is an arbitration agreement in relation to the debt underlying the petition, the companies court is bound to give effect to the s. 10 provision regarding a mandatory stay, notwithstanding that there is no such provision, express or implied to that effect in the CA. In other words, the debtor company becomes effectively entitled to a stay in much the same manner as would an applicant for a stay under s. 10 of the AA, although the section is not

applicable. The net result is that where the disputed debt falls within the purview of an arbitration agreement, a stay is almost inevitable given the low threshold applied. On the other hand, where the disputed debt does not fall within the purview of an arbitration agreement the debtor company has to achieve the higher standard of a debt disputed on substantial grounds. This in turn gives rise to an inconsistent practice in the companies court where petitions with arbitration agreements will be dealt with differently from petitions without;

(iii) the importation of a lower threshold into the exercise of discretion by the companies court in adjudicating on a petition will also render the exercise of discretion of such court under winding-up legislation, illusory;

(iv) the winding-up process by its very nature does not seek to determine the underlying dispute between the petitioning creditor and the respondent to the winding-up petition. The determination of the existence and quantum of the debt is not the purpose of winding-up proceedings. The purpose is to ascertain whether the respondent or defendant to the winding-up petition is insolvent or otherwise, for the benefit of the body of unsecured creditors as explained earlier. It is a process of collective enforcement of debts by the body of unsecured creditors who will be prejudiced if an insolvent company is allowed to continue to operate despite being insolvent. To that end, its purpose and effect is entirely different from arbitration which seeks to adjudicate on the debt itself to ascertain whether it is due or not. Indeed, it is because of this that the policies underlying the arbitration legislation are not offended by requiring a genuine and substantial dispute to be proven before preventing the commencement of winding-up proceedings (*Sian*, [88] to 90]);

(v) as the purpose of the winding-up proceedings differs from that of arbitration which seeks to determine the dispute between the parties, there is no reason to import or invoke those provisions or their legislative intent so as to fetter or curtail the ability of the companies court to ascertain whether the respondent is insolvent or not. The companies court ascertains the issue of insolvency by applying the test of whether the underlying debt is genuinely disputed on substantial grounds. There is no reason to dilute or reduce that threshold test by reason of the existence of an arbitration agreement, or by virtue of the AA because neither imposes expressly or impliedly any restriction on the exercise of discretion by the companies court when hearing a winding-up petition. The conventional test set out in *Mann v. Goldstein* (*supra*) and *Tan Kok Tong* (*supra*) will be effectively eroded or abrogated;

(vi) it also follows that if coherence is sought to be achieved by equating the commencement of proceedings in court in respect of a dispute where there is an arbitration clause and which therefore brings into play a mandatory stay under s. 10 of the AA, with the initiation of a winding-up petition in respect of that debt, then this is not a tenable comparison because the winding-up petition cannot be equated to the commencement of a suit or action for recovery of the debt. The winding-up process on the other hand serves to ascertain the status of solvency of the company and if found to be insolvent, to allow the collective debt recovery on behalf of creditors to ensue;

(vii) in *Salford*, while the policy underlying arbitration was given weight and consideration, the policy underlying the winding-up process was not accorded sufficient weight. Although the purpose and object of the winding-up process was stated, these important factors and policy were given little weight when it was concluded that the legislative intent should be taken into the balance when determining whether to stay, restrain, dismiss or allow the petition;

(viii) weight should be accorded to the fact that even where there is an arbitration agreement and parties ought to be held to their agreement, the primary focus of a winding-up petition is to ascertain a company's solvency or insolvency. Where insufficient weight is accorded to this factor, and greater weight is accorded to the need to hold the parties to their arbitration agreement, then the balance required between insolvency and arbitration is misaligned. A balance ought to be achieved in each case and this is best achieved by allowing the prevailing laws to apply respectively;

(ix) when a winding-up petition is dismissed to allow an arbitration to proceed, there is likely to be some delay in the arbitral process until a final award is handed down. If the defendant or debtor company is indeed insolvent, then firstly, the delay in arbitration is likely to result in a diminution of proceeds for the rest of the body of creditors. Secondly, such assets as remain are likely to be dissipated without a liquidator, to the detriment of the creditors. The priority accorded to the arbitration process under the AA will defeat the policy considerations behind the winding-up process;

(x) indeed, these policy considerations apply with equal force immediately prior to insolvency. The undue delay in asset recovery for unsecured creditors arises when excessive weight is given to an arbitration agreement, thereby postponing the appointment of a liquidator and impeding the commencement of the insolvency process – even if it has not technically begun. In other words, these concerns are triggered at the point when a creditor files a winding-up application, not merely after a liquidator is appointed;

(xi) it follows that while creditors should be held to their commitment to arbitrate a dispute that they have agreed to, this cannot encroach on the winding-up process when there is no real dispute that the debt is due and the company is unable to make that payment. That inability to pay raises the presumption of insolvency which needs to be rebutted by the company. If the companies court is precluded from weighing up this issue, as is the case where a lesser threshold is applied, then the issue of insolvency remains unresolved. It is important that in weighing this up the companies court is not fettered in the exercise of its discretion and its powers, which will involve ascertaining the solvency of the company;

(xii) a primary reason put forward for applying the lower threshold is that a creditor who seeks to use winding-up to enforce his debt rather than going through arbitration as he contracted to, is abusing the insolvency process. Where there is abuse arising in the form of the filing of a winding-up petition even where a debt is genuinely disputed and the matter requires adjudication in the courts or by way of arbitration, the remedy is to strike out the petition and to penalise the wrongful use of the winding-up process by way of indemnity costs, as has been stated in *Sian* and *Dayang*. In most cases, it is usually evident that the creditor initiating the winding-up process is simply seeking to circumvent his contractual obligation to arbitrate the dispute, as was the case in this appeal;

(xiii) the proof of debt process will allow the claims of all creditors of an insolvent company to be given due consideration. It then remains open to the liquidator to proceed with arbitration, while all other creditors are protected too;

(xiv) the requirement to give weight to the legislative intent of the arbitration legislation as articulated in *Salford* leaves open the prospect of such considerations being required to be taken into consideration, in relation to restructuring, such as in a scheme of arrangement. This can cause considerable delay and consequently, the entire scheme of arrangement may well fail. Therefore, it is imperative that a balance is found in administering the demands of the arbitration regime versus the insolvency regime. That balance is best found by allowing each claim under these respective areas of the law to proceed as specified under their respective acts and balancing the needs of each case in accordance with its own peculiar requirements. This is preferable to according undue weight to either insolvency or arbitration policy in determining these matters. In a case where the company is clearly insolvent it would follow that insolvency considerations may take precedence. Where a debt is genuinely disputed and the indicia of insolvency are absent or faint, then arbitration is likely to take precedence;

(xv) in applying a lower threshold or standard of review, the focus of the issue centres primarily on the parties to the arbitration, to the exclusion of other creditors whose interests would be adversely affected if the debtor company is in fact insolvent. This approach does not take into consideration the possibility of the debtor company whose debt falls within the purview of an arbitration agreement, actually being insolvent. If in fact the debtor is insolvent, and the arbitration proceeds, the effect on the body of unsecured creditors is adverse;

(xvi) what too if a creditor other than the one falling within the purview of the arbitration agreement initiates a winding-up petition? Following from the lower threshold reasoning, a different standard would fall to be applied, namely the conventional test of a genuinely disputed debt on a substantial basis. As stated earlier, the application of different tests within a single area of law is not equitable, nor warranted where the issue for assessment is the same, namely whether the company is insolvent or not; and

(xvii) for these reasons we concluded that *Sian* achieved the balance required in determining the threshold to be applied by the companies court when deciding whether to allow, restrain, stay or dismiss a petition premised on a debt which is disputed and the subject matter of an arbitration agreement – namely the higher threshold test of whether the debt is genuinely disputed on substantial grounds.

[163] In analysing the issue before us, we have had regard to international jurisprudence because:

(i) the New York Convention and the UNCITRAL Model Law on Arbitration comprise the basis for arbitration legislation in many jurisdictions; and

(ii) the winding-up legislation in many common law jurisdictions share similar if not identical provisions in relation to winding-up; (not to forget the UNCITRAL Model Law on Cross-Border Insolvency (which Malaysia has not adopted) which is also being adopted in many jurisdictions.

[164] The ultimate aim is to achieve uniformity in their interpretation, and to this end the reasoned decisions of various countries allow for a ventilation of views on legal issues such as the present where there is seeming conflict. Ultimately, it is a matter of balancing interests in each particular area of the law equitably and without a transgression of foundational principles in each.

A **Application Of The Test In This Appeal**

[165] Having determined that the higher threshold test of a genuinely disputed debt on substantial grounds is the correct test to apply, we then proceeded to apply this test to the facts of the instant appeal. We found that:

B (i) although the distribution agreement stipulates that it is effectively a sale and purchase agreement of two medical devices between Swissray and the company, the conduct of the parties both prior to and after the signing of the distribution agreement as set out in the factual matrix above indicates that is genuinely not clear whether it was an outright sale to the company or for the company to sell the same to the C end-user/purchaser;

(ii) alternatively, there is a possibility of a waiver of the terms of the agreement by conduct; or the existence of a collateral contract. In other words, there is sufficient material evidence to warrant the court being D satisfied that it is not a question of an undisputed debt that was being frivolously disputed;

(iii) when the chronology and factual matrix is considered holistically, it is clear that there are no acknowledgements or admissions of a debt in the sum of USD$158,413.75 which is the sum claimed in the statutory E demand. Instead, any acknowledgements by the company related to payment of the deposit of the two medical devices, which is a far lesser sum than the full purchase price specified in the statutory demand. The Court of Appeal erred in treating the payment towards deposits as being equivalent to an admission of liability for the full purchase price;

F (iv) there was no termination of the agreement as stated above, because the parties continued to try to effect a sale of the two medical devices as well as resolve the matter between themselves long after the service of the written notice of termination. Therefore, the sum claimed under statutory demand cannot be said to be an accrued debt due to Swissray; G and

(v) the fact of the termination of Swissray as the distributor for Novadaq medical devices raised issues relating to Swissray's aut horisation to even deal with these products as a seller. Its entitlement to receive the sum claimed in the statutory notice was put in issue when it advised the H company to deliver the devices to a third-party company and egotiate any commission with that third party.

Conclusion

[166] We now turn to the questions of law posed to this court:

I

(i) Leave Question No. 1:

Where a party to an arbitration agreement issues a notice under s. 466(1)(a) of the Companies Act 2016 against the other party in respect of a debt that is disputed, such dispute falling within the ambit of the said arbitration agreement, in seeking to restrain the filing or continuing of winding-up proceedings grounded on such notice, is the other party required:

(a) to fulfil the "*bona fide* dispute on substantial grounds as to the debt" test applicable to *Fortuna* injunctions; or

(b) to merely show that the debt is not admitted for such injunct ion to have been granted, having regard to the policy and spirit of the Arbitration Act 2005 that parties to an arbitration agreement are to be held to their said agreement that any dispute within its ambit is to be arbitrated.

Answer: Where a party to an arbitration agreement issues a notice under s. 466(1)(a) of the Companies Act 2016 against the other party in respect of a debt that is disputed, such dispute falling within the ambit of the said arbitration agreement, in seeking to restrain the filing or continuing of winding-up proceedings grounded on such notice, the other party is required to show the debt is *bona fide* disputed on substantial grounds.

(ii) in light of our answer to Question 1, it is not necessary to answer Questions 2 and 3.

[167] The matters discussed above, to our mind, comprised sufficient basis to amount to a genuinely disputed debt on substantial grounds. As such the liability for the debt has to be determined by way of arbitration as the dispute is subject to an arbitration agreement. We therefore allowed the appeal and ordered that the restraining or *Fortuna* injunction be reinstated as ordered by the High Court, so that the claim could be referred to arbitration.

Endnotes:

1. Redfern and Hunter on International Arbitration, 6th edn by Nigel Blackaby and Constantine Partasides QC with Alan Refern and Martin Hunter (Oxford University Press, 2015 – Chapter 1 at para. 1.4.
2. Section 2(1) AA: "party" means a party to an arbitration agreement or, in any case where an arbitration does not involve all the parties to the arbitration agreement, means a party to the arbitration.
3. See Insolvency Law: A Matter of Public Interest? By Andrew Keay, Professor of Law and Head of Postgraduate and Professional Studies and Research, School of Legal Studies, University of Wolverhampton.
4. Under s. 465(1)(e) of the Companies Act 2016.